Supreme Court, U.S.
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No. 07-1522

In The
Supreme Court of the United States

JUDITH CLARK,

Petitioner,

v.

ADA PEREZ, Superintendant, Bedford Hills Correctional Facility, ANDREW CUOMO, Attorney General, State of New York,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did a state trial court violate the constitutional rights of the Petitioner (as the district court held in this case on a writ of habeas corpus) when it permitted a trial to go forward when neither the defendant nor any attorney representing the defendant appeared in court during the presentation of the prosecution's entire case.

2. Did the state trial court violate the constitutional rights of the Petitioner (as the district court held in this case on a writ of habeas corpus) when it was aware she would not follow proper court procedures, yet it allowed her to proceed *pro se*, contrary to this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975).

3. Did the state court violate the constitutional rights of the Petitioner (as the district court held in this case on a writ of habeas corpus) when it did not provide for stand-by counsel to assume responsibility for the case when, as expected, the defendant acted in a disruptive manner and left the courtroom.

4. If a procedural default occurred in state court proceeding as a direct result of a constitutional violation, may a federal court on habeas corpus excuse that violation under the principles established in *Lee v. Kemna*, 534. U.S. 362, 376 (2002), which required federal courts not

to make an "exorbitant application of a generally sound rule "

5. If a procedural default occurred in state court proceeding as a direct result of a constitutional violation, may a federal court on habeas corpus consider that violation to be the "cause" of the procedural default, this excusing that violation, as in cases involving ineffectiveness of counsel, where such ineffectiveness can be considered "cause," see *Edwards v. Carpenter,* 529 U.S. 446 (2000)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Judith Clark respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit entered in this proceeding on January 3, 2008, rehearing denied on March 6, 2008.

OPINIONS BELOW

The order of the Second Circuit refusing en banc review is unreported and is reproduced in Appendix D at App. 132. The opinion of the Court of Appeals for the Second Circuit is reported at 510 F.3d 382 (2d Cir. 2008) and is reproduced in Appendix A at App. 1-34. The opinion of the district court granting the writ of habeas corpus is reported at 450 F.Supp.2d 396 (S.D.N.Y. 2006) and is reproduced in Appendix B at App. 35-121. The opinion of the district court granting a stay of its decision but denying the State's motion to amend the judgment is unreported and is reproduced in Appendix C at App. 122-131.

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit was issued on January 3, 2008. A timely petition for rehearing was filed on January 16, 2008. The petition was denied on March 6, 2008. (See Appendix D, App. 132-133). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth and Sixth Amendments to the Constitution.

STATEMENT OF THE CASE

In this case, Petitioner Judith Clark, a "political" defendant, insisted on representing herself in a notorious robbery and murder case in a New York state court trial. The crimes were perpetrated by a group of radicals in 1981 (The defendant herself was never accused of being one of the shooters who committed the homicides). Petitioner indicated from the start that she was not interested in presenting a proper legal defense, but nevertheless insisted on representing herself. The trial court was aware that Petitioner would not follow courtroom rules, indeed warned her that if she acted up and was removed from the courtroom, there would be no one in the court to represent her. He then allowed her to proceed *pro se*, but took no protective measures, such as appointing stand-by counsel.

As the trial judge predicted, the defendant refused to obey the rules, insisting on presenting a political defense, removed herself from the courtroom when the prosecution presented its entire case during which time there was no one in the courtroom to defend her interests. She was found guilty and sentenced to a minimum term of 75 years (three consecutive 25 years to life terms).

While still in her revolutionary fervor, she took no appeal from the judgment of conviction.

Years later she found counsel who filed post-conviction motions in state court which were denied. After exhausting her state remedies, she filed a writ of habeas corpus, which was granted by the district court. (See Appendix B, App. 35-121). That Court found:

> During the prosecutor's opening statement and during the government's entire direct case against defendants, which spanned at least seven trial days, *no one* was present in the courtroom to represent Clark's interests. Clark was without assistance of counsel for her defense, in clear abrogation of her Sixth Amendment right to counsel. Indeed, these facts demonstrate the very reason that Clark's waiver of her right to counsel, even if sufficient *ab initio,* could not be irrevocable -- the rationale lies in the judiciary's "'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" [citing *Wheat v. United States*, 486 U.S. 153, 160 (1988).] The proceedings at issue, with no one sitting at the defense table during the prosecution's entire case, would have appeared unfair to many people with knowledge of the constitutional right to counsel or a respect for our adversarial

system of justice. App. 120

On appeal, the Second Circuit reversed. See App. A. It found that the defendant voluntarily chose to represent herself and to leave the courtroom and thus waived her constitutional rights. In any event, the Court of Appeals found, she had procedurally defaulted by not appealing the original judgment of conviction.

The key issue in this case is one that has challenged the legal system in a variety of recent situations. How is a court to insure a fair trial to an individual who does not respect our legal system and wishes to present a political defense rather than a legal defense? What should a court do when a defendant insists on defending herself when she is not capable of doing so (as in *Edwards v. Indiana*, 866 N.E.2d 252, [Ind. 2007] *cert. granted*, Docket No. 07-208), or when he or she refuses to follow proper procedures, as in the recent *Moussaoui* case in Virginia (*United States v. Moussouai*, 2003 WL 22258213 [E.D. Va August 29, 2003] recounting how standby counsel assumed responsibility for the case) or in the cases before the military commissions in Guantanamo (see Carol Rosenberg, "Boycotting Detainees Create Legal Conundrum," *Miami Herald,* April 14, 2008, 2008 WLNR 6967438)(recounting how some detainees are rejecting military counsel and are refusing to cooperate with them).

In the Colin Ferguson case (the Long Island Railroad murderer who clearly had mental problems), the court permitted pro se representation but appointed stand-by counsel as well. See *Newsday*, February 15, 1995, p. A31. Even Saddam Hussein had stand-by counsel who assumed responsibility for defending him when he walked out of court in Iraq, and his own lawyers boycotted the proceedings. See *New York Times*, July 28, 2006, p. A10.

Courts that have confronted this type of situation, other than the Second Circuit below, have determined that the defendant's wishes do not have to be followed, that the legal system has its own demands, that among those demands is that "justice must satisfy the appearance of justice," *Offut v. United States,* 348 U.S. 11, 14 (1954). This Court has noted that "[S]ome minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Mezzanto*, 573 U.S. 196, 204 (1995).

In the course of the oral argument in the *Indiana v. Edwards* case, Justice Scalia stated the obvious proposition that in these situations, there must be some effort to provide counsel even over the objection of the defendant:

> JUSTICE SCALIA: If it gets to be bad, the court can terminate it and say, you know, you can't represent yourself. We're going to bring in counsel.

> MR. DREEBEN: Well, Justice Scalia, I think under existing law that could not be done if the Respondent's view of *Faretta* is adopted as an absolute rule.
>
> JUSTICE SCALIA: Sure, it could be done if the trial is, indeed, turning into a farce.

Indiana v. Edwards, Docket No, 07-208, Transcript of Oral Argument, March 26, 2008, 2008 WL 791973 at p. 22.

In this case, the trial was indeed "turning into a farce," because of the total absence of defendants or any counsel while the prosecution's case was proceeding. Yet the trial judge allowed it to continue.

If a defendant wants to defend herself in order to present a political defense and will not (or does not agree to) follow the rules of the court, that does not mean that a court must accede to the defendant's wishes. A court has a variety of solutions: (1) refuse to allow pro se representation unless it is clear that defendant will obey courtroom rules, as this Court required in the *Faretta* case; (2) appoint stand-by counsel to assume responsibility of the case if the "political" defendant refuses to follow courtroom rules; (3) declare a mistrial when the defendant leaves the courtroom and there is no one available to substitute as her representative.

What it cannot do is what happened in this case: allow a trial to continue with no one in the courtroom to defend an accused while the trial continues.

With respect to the procedural waiver issue, the district court followed this Court's decision in *Lee v. Kemna*, 534 U.S. 362, 386-87 (2002), to the effect that a federal court should "evaluate the state interest in a procedural rule against the circumstances of a particular case." In this case, the court found that

> Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might have been different. Because Clark's failure to appeal was "justifiable" given the rare circumstances of her case, application of the procedural bar in [New York CPL] section 440.10(2)(c) [the state procedural rule] was not demanded. App.101.

The Second Circuit rejected that analysis. It found that compliance with the state rule *was* demanded under the circumstances of the case, and refused to recognize the unique situation of this case, as required by *Lee*. Thus, it found, the failure to appeal constituted a procedural bar to any later habeas petition.

This Court should grant certiorari to provide guidance to the courts on how to protect the Sixth Amendment rights of defendants even when they act in a self-destructive manner. This is necessary since courts have an "'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" *Wheat v. United States*, 486 U.S. 153, 160 (1988). What steps must a court take to insure that result?

This Court should also grant certiorari to determine the application of the *Lee* rules on when "exorbitant application of a generally sound rule" undermines the requirements of the 5th and 6th Amendments. It should also examine the question of whether the total absence of counsel constitutes "cause" that would excuse the procedural default, in the same way that ineffective assistance of counsel constitutes "cause." See *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000).

Factual Background

Petitioner Judith Clark ("Clark") is a former leftist radical who, with four other individuals, including Kathy Boudin, was accused of participating in a 1981 Brinks armored truck robbery in Nyack, New York. A Brinks guard, Peter Paige and two policemen, Officer Waverly Brown and Sgt. Edward O'Grady, were killed during the robbery and other persons were injured

by gunfire. The crime drew considerable attention because of the killing of two law enforcement officers and because the persons eventually arrested for the crimes were white and black militants with histories in the radical movements of the 1960's and 1970's. Ms. Clark was alleged to have been part of the "support team" that participated in the robbery.

Ms. Clark was never accused of being one of the "shooters." The persons doing the shooting were described as "six armed men," see *People v. Brown*, 136 A.D.2d 1, 18, 525 N.Y.S.2d 618, 620 (2d Dept. 1988). Some of the alleged participants were tried in federal court for violations of the RICO statute (with the Brinks robbery being considered one of the overt acts), were found guilty and served a twelve-year federal term for ancillary crimes related to the robbery and have been released.[1] Other participants in the Brinks robbery were arrested in 1986 and tried in 1988. Two received 60 and 40 year sentences respectively. See *New York Times*, August 3, 1988, B3. Since the crimes occurred before the sentencing guidelines came into effect (on November 1, 1987), the defendants will be eligible for parole on those charges after serving 1/3 of their sentences. See former provision in 18 U.S.C. § 4205(a).

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[1] Federal indictment no. 82 Cr. 312 (S.D.N.Y. 1982), and *United States v. Ferguson*, 758 F.2d 843, 847-48 (2d Cir. 1985), showing that two of the persons indicted for the murders, Cecil Ferguson and Edward Lawrence Joseph, received 12 ½ year sentences in 1984.

Ms. Clark was unconstitutionally denied the right to counsel at her trial, where she was improperly allowed to appear pro se. The trial was a highly politically-charged and sensational media event. The state trial judge (The Hon. David S. Ritter) was understandably concerned that the Defendants (Judith Clark, David Gilbert and Kuwasi Balagon) would try to use the trial as a showcase for their political beliefs. The Defendants certainly indicated during pretrial proceedings that they were planning precisely such a disruptive, political defense. But the solution chosen by the judge to meet this contingency was constitutionally flawed. Disregarding the requirements of *Faretta v. California*, 422 U.S. 806 (1975), the court had granted Ms. Clark's application to appear pro se (an erroneous decision knowing that she would not abide by the court's rules). In an astonishing statement, the judge noted the problems he was having keeping order in the court before he could pass on the request for *pro se* representation, which he knew could only lead to more disruption. He said:

> My efforts to conduct the questioning required by law of a defendant so that [I] can make a determination as to whether the waiver of counsel . . is a knowing and intelligent waiver . . have been frustrated by the refusal of the defendants to conform to the most rudimentary rules of order so

> that I can elicit the information required in order to make a ruling. App. 41.

Thereafter, the trial judge compounded the error by failing to prepare against the obvious problem of what to do if the Defendants disrupted the proceedings (i.e., mounted a political defense) while acting as their own lawyers, which actions might necessitate their removal from the courtroom. The judge was aware that this could (indeed, probably would) occur since he told Ms. Clark immediately prior to granting her request to appear pro se:

> You are aware that if I grant your application, and I am disposed to do so, that if there comes a time where I am required as I see fit by reason of your conduct to remove you from the courtroom, you will, at that juncture, be unrepresented. Are you aware of that significance? App. 40-41

The trial judge granted pro se status despite the fact that Ms. Clark clearly stated her intention to use the courtroom as a political platform.

> MS. CLARK: . . . . We consider ourselves freedom fighters, and we do not believe that the question at hand in this situation has anything to do with guilt or innocence or the question of criminal acts, but has to do with the underlying issues of the struggle, a just struggle for national

> liberation by New Afrikan forces and New Afrikan people, and the responsibility of white anti-imperialists to give support to that at every level. . . App. 49.

Preliminarily, Ms.Clark had the assistance of an attorney who acted as her legal adviser. However, Ms. Clark's legal adviser had a prior commitment to appear in the pending federal case dealing with the same incident. The Court would not postpone the trial in order to enable that attorney to be available for the state trial. (SA21). While another counsel was available to give legal advice to all three Defendants at counsel table that attorney was not permitted to address the court. (JA324-25)

After a certain number of jurors were dismissed for hardship reasons, the Defendants began to question the prospective jurors (who were selected anonymously) to determine their attitudes about the political ideology held by the Defendants. (JA250-56; 286-87). The Court told the Defendants that the questions were improper. But the Defendants objected to the court's restrictions on their ability to ask such questions. When the court continued to restrict their political questions, the Defendants refused to participate any further in the proceedings and left the courtroom. Ms. Clark noted her objection as follows:

> MS. CLARK: . . . For us to continue voir dire and give any legitimacy to the

> picking of a jury whose function is illegitimate and whose fascist implications are made more extreme by its anonymous nature would undermine our basic principles. I join in saying I do not wish to be here anymore. . . .
>
> THE COURT: I will permit the Petitioners, at their request, to withdraw from the courtroom. They are to be held in the downstairs holding area. We will activate the microphone system. You may return when you wish to do so, provided you are willing to abide by the rules that apply to courtroom conduct. We will take a brief recess. App. 57

Thereafter, jury voir dire continued for six days without the Defendants present, and an anonymous jury was selected early in August, 1983. Opening statements were scheduled for August 8, 1983. On that day, one of the Defendants, Mr. Balagoon, attempted to make an opening statement that discussed the political background of the accusations against the Petitioners. The Court would not permit him to complete his statement. Judge Ritter stated: When he was not permitted to do so, Balagoon left the court. (SA31-32) The other defendants followed.

> MS. CLARK: We are not going to continue when you throw Mr. Balagoon out.

THE COURT: By "we are not going to continue", do you mean that you wish to withdraw from the courtroom, is that what I am to understand? You are apparently packing up.

MS. CLARK: Number one, I am an anti-imperialist freedom fighter. I don't recognize the legitimacy of this Court. Second of all, I am not going to continue here just as though everything was just proper when what's obvious is obvious, which is, that the truth about the question of New Afrika is not allowed to be spoken in this courtroom. . . . .

* * *

THE COURT: Do you understand, sir, that if you leave the courtroom, and I say this to all three of you, that during that period that you are absent the case will continue, it will go on. You will not be able to participate in those steps of the trial, namely the presentation of a proper opening statement within the boundaries of what is permissible. You will not be able to participate in the examination and cross examination of witnesses in raising objections while you are out of the courtroom, and in doing any of the things that a person accused of a crime is permitted to do. If you make such a choice, I repeat I think it is short-sighted, but it is a choice that you may make if that is what

you wish to do. Miss Clark, you wish to withdraw as well, is that correct?

MS. CLARK: Yes.

THE COURT: All right. All of you may withdraw. You know how to come back and under what conditions if you wish. Court stands in temporary recess.

MS. CLARK: You say we may withdraw. It should be obvious that we have been forced into this court. We don't accept its legitimacy. App.60-62.

Thereafter, the trial judge announced at the beginning of each day of the trial, that the Petitioners had chosen to remain out of the courtroom.

THE COURT: Good morning. The sound system [in the basement holding cells] is in place and functioning. . . . By voluntarily remaining out of the courtroom, the Petitioners are giving up their right to be present and to participate in the trial by cross-examining witnesses, by making objections and motions, offering evidence, making final arguments and requests and objection to the final charge, as well as all the other rights that are provided by law. The Petitioners, collectively or individually may, of course, return to the courtroom at any time that they or any one of them wish

> to participate in the trial. Each day, including today, Petitioners are asked by the deputy sheriffs, who are assigned to be with them, if they wish to return to the courtroom. If and when they, or any one of them do, that, of course, will be permitted.
>
> THE COURT: Bring in the jury.
> (Jury brought in)
>
> THE COURT: Ladies and gentlemen, good morning to you. We are ready to continue. The Petitioners have elected not to be present today, as is their right. You are, of course, to draw no inference unfavorable to them or favorable to anybody. You are to draw no inference from that fact at all. We will simply proceed with the case as I indicated yesterday. All right Mr. Gribetz, call your next witness.

(JA387-88)

This last announcement was made at the beginning of each day of the trial when the Petitioners were not present. (JA. 390, 393, 396).

The Defendants were housed in certain holding cells in the basement of the courthouse. Ms. Clark explains:

> 60. I was able to hear the proceedings in court via a speaker system which was wired onto the wall opposite our

> cells in the area utilized by the officers. I could hear the voices of the prosecutor and the judge through those speakers, but it was virtually impossible to follow what was actually happening, because I could not see who was speaking to whom. I could not tell whether the prosecutor was talking or the witness. Worse, when the witnesses referred to exhibits (of which there were hundreds), I had no idea what they were talking about. We were certainly never shown the exhibits before they were introduced into evidence. (SA35-6)

On August 8, 1983, the Defendants, appearing pro se, made opening statements and then withdrew from the proceedings before any witnesses were called. (JA358-76) Thereafter on August 9, 10, 11, 15, 16, 17, and 22, 1983, when the prosecution put on its case, neither the Defendants nor their legal advisers were in the courtroom. (JA386-409) On August 22 and 29, 1983, the other Defendants (David Gilbert and Kuwasi Balagoon) made various motions outside the presence of the jury, and then withdrew before any witnesses were called. (JA410-30). On September 12 and 13, 1983, the Defendants appeared to present a single witness on their behalf. (JA446-95)(App. 65). They made closing statements on September 13, 1983. (JA505-17)(App. 67). The jury returned guilty verdicts against all Defendants on September 14, 1983. On October 6, 1983, the Defendants returned for sentencing. They were each sentenced to three

sentences of 25 years to life, to be served consecutively. (JA538)

No appeal or any other post-conviction proceeding was ever filed by any of the Defendants until Petitioner Clark filed a CPL 440 motion in December, 2002.

The CPL § 440.10 Motion

On December 12, 2002, nineteen years after her sentencing, Petitioner Clark, represented by counsel, filed a motion to set aside her conviction under New York Criminal Procedure Law ("CPL") § 440.10. The motion was based upon a 54-page affidavit from Petitioner Clark that expressed her regret for her actions, her rejection of her past life and explained the reasons for her delay in pursuing any legal remedy. (SA7-60):

> 2. I am now fifty-three years old. I am very distant from the woman I was twenty-one years ago. I am deeply ashamed of my actions, which contributed to the deaths of three innocent men and physical and emotional injuries and losses to many others. I have spent a good part of my years in prison trying to understand the inner and external forces that propelled me into such self-destructive, anti-human behavior.

The statements of two trained psychologists were submitted on the 440 motion, which explained why Ms. Clark was not capable of

taking any steps to appeal her case until many years had passed. Dr. Stuart Grassian stated that after trial, she was sent to Bedford Hills and immediately placed in the Special Housing Unit (SHU). She suffered from Major Depression in the years after she arrived in prison. (SA 39-41). Dr. Gilda Zwerman explained that it took her some period of time to confront the reality of what she did, to appreciate the damage she had done, to confront the victims as real human beings, and to come to terms with her own responsibility for their deaths. Only then was she in a position to take active steps to appeal her case. (Exhibit 12 to 460.15 motion to Appellate Division, Affidavit of Gilda Zwerman).

Petitioner Clark raised three arguments in support of her Article 440.10 motion. First, she argued that she should not have been allowed to appear pro se, given the strong indication that she would act in a disruptive manner. Even if a person has the intelligence and the desire to act pro se, he or she must have the will to act in a legally responsible manner, and "abide by rules of procedure and courtroom protocol," as this Court required in *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984).

Second, even if a defendant is permitted to appear pro se, a court must appoint stand-by counsel if there is any indication that the defendant would act in a disruptive manner and thus lose her right to appear pro se.

Finally, Petitioner Clark argued in her 440 motion that no matter how the situation developed, a trial cannot continue with no one in the courtroom to protect her interests. The Court's warning to the Defendants showed that the court anticipated possible political disruption. The Court knew that Clark was not interested in mounting a proper legal defense But it did nothing to solve the problem. This Court explained in *Faretta*:

> Both [prosecutors and judges] are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. . . . that goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the 'freedom' 'to go to jail under his own banner . . ..' *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (CA2 1965). *The system of criminal justice should not be available as an instrument of self-destruction.*

422 U.S. at 839-840 (emphasis added)

Petitioner Clark also argued that a Section 440.10 motion would lie despite the long period of time that had elapsed, because of her assertion of

the right to counsel. She also argued that the failure to appeal was "justified" given the circumstances which she was facing.

The Supreme Court, Rockland County denied the Petitioner's 440 motion. The court found that the claim could not be brought because it was procedurally defaulted: "Defendant cannot overcome the procedural bar which prevents consideration of her claims." (JA85) It also noted that: "The court finds that defendant's motion is procedurally barred, and is therefore denied in its entirety." App. 74.

> CPL §440.10(2)(c) mandates denial of a motion to vacate when 'sufficient facts appear on the record' to permit an appellate court adequate review of the issue raised on appeal, or when such facts appear on the record, and a Petitioner unjustifiably fails to take an appeal or to raise such claim in an appeal actually perfected. The record herein is more than adequate to have permitted an appellate court to consider the claims raised. Nevertheless, Petitioner did not appeal, and now, twenty years later, she asks this court to consider these claims. (JA85)(App. 72)

The Habeas Corpus Petition

Petitioner then filed a writ of habeas corpus in the district court. The district judge found that there was no procedural default. It applied the

Second Circuit decision in *Cotto v. Herbert*, 331 F.3d 217, 240 (2d Cur. 2003), which followed this Court decision in *Lee v. Kemna*. This Court noted that even if a rule is "firmly established and regularly followed," its application in a particular case may be "exorbitant" and "inadequate to stop consideration of a federal question." 534 U.S. at 376.

The district court found that: (1) the procedural violation did not affect state court's ruling on the 440.10 motion, since it was prepared to hold against the petitioner on the merits, as the state court explicitly asserted (App. 106); (2) compliance with the procedural default rule was not demanded in the circumstances of this case since the language of CPL § 440.10(2)(c) provides that a motion to vacate must be denied when there was an "unjustifiable failure to take or perfect" an appeal. And in this case the failure was "justified" since petitioner did not have counsel and none was appointed for her (App. 109-110); (3). there was substantial compliance with the procedural rule "given the particular circumstances of her case," namely the lack of counsel. (App.111-12).

Finally, looking at the merits of the case, the district court found that the trial court erred in allowing Ms. Clark to appear pro se when she made clear that she would not be willing to abide by the rules of courtroom procedure or follow court protocol. App. 117. Next the district court found that the state trial court erred in not revoking the

petitioner's pro se status and appointing stand-by counsel when it became clear that she would not follow court rules. App. 118. Finally, the court noted that Clark "was without assistance of counsel for her defense, in clear abrogation of her Sixth Amendment right to counsel. Indeed, these facts demonstrate the very reason that Clark's waiver of her right to counsel, even if sufficient *ab initio,* could not be irrevocable -- the rationale lies in the judiciary's '"independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" App. 120.

The Second Circuit reversed. It found that there was a procedural bar. Under New York law, a party complaining of trial error that was apparent on the record was required to file an appeal within 30 days of the judgment of conviction in order to seek any post-conviction remedies. Petitioner did not do so. The court found: "Under these circumstances, the state court's application of the requirement that claims be raised on direct appeal can hardly be described as 'exorbitant.'" App. 15.

The Court of Appeals also rejected Petitioner's claim on the merits. It found that Petitioner willingly and knowingly waived her right to counsel and chose to appear pro se. It found that Petitioner "made a conscious strategic choice to waive her right to be present in the courtroom as part of a *de facto* political protest

defense, and was afforded the opportunity to return whenever she chose." App. 30.

Relying on an earlier Second Circuit precedent, *United States v. Torres*, 140 F.3d 392 (2d Cir. 1998). It found that the court's acceptance of the voluntary absence of a defendant from the courtroom did not violate her rights. It concluded:

> If she faced trial without advantages guaranteed by the Sixth Amendment, that was not by the trial judge's imposition, but by her own informed choice, which the trial judge was bound to respect. Her claim of violation of her constitutional rights has no merit whatsoever. App. 34.

REASONS FOR GRANTING THE WRIT

The Court Below Made Erroneous Rulings on the Prerequisites for Allowing Defendant to Appear Pro Se, the Extent of and Need for Sixth Amendment Protection, and the Scope of the Procedural Default Rule, Issues Which Arise Frequently In The Criminal Justice Field

A. The Second Circuit Erred in Finding That There Was No Constitutional Violation.

The Second Circuit decision ignored basic principles of Sixth Amendment law. As stated in *Illinois v. Allen*, 397 U.S. 337, 338 (1970), "One of the most basic of the rights guaranteed by the

Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." In addition, counsel must be present at every crucial stage of a trial in order to protect a defendant's rights. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic,* 466 U.S. 648, 654 (1984) (citation omitted). Thus, a defendant requires an attorney's "guiding hand" through every stage of the proceedings against him. *Powell v. Alabama,* 287 U.S. 45, 53 (1932). For neither a defendant nor any counsel to be present at any time while the prosecution presents its case violates every aspect of the Fifth and Sixth Amendments.

It is true that certain constitutional rights may be waived (or forfeited), but this Court has set very high standards before the right to counsel may be waived. In the case of pro se representation, this Court's pronouncements in *Faretta* and *McKaskle* have established such standards. Those cases emphasized that the right to self-representation is not an absolute and that some effort must be made to insure that a defendant has a proper defense.

In *Faretta*, the Court emphasized that "the right to self-representation [is the right] to make one's own defense personally," 422 U.S. at 819. The right to proceed *pro se* is just that – *a right to proceed,* that is "to manage and conduct their own

defense," *id.* at 817. It is not a right to withdraw from the proceedings. This Court noted: "the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial *to make a defense as we know it.*" *Faretta* 422 U.S. at 818 (emphasis added)

The *Faretta* exception to the counsel requirement is designed to increase, not diminish, the accused's participation in the trial. An accused's refusal to participate in the proceedings is antithetical to any purported invocation of the right to proceed *pro se* carved out by *Faretta.* At the least, when a court sees the possibility of such a withdrawal, it must appoint stand-by counsel. This Court explained.

> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. 422 U.S. at 834.

Thus, it is fundamental that a defendant should not be allowed to proceed pro se if there is any indication that the he or she will not follow courtroom protocol and disrupt the proceedings. This Court explained the reach of *Faretta* in *McKaskle v. Wiggins* 465 U.S. 168, 173 (1984)(emphasis added).

> In *Faretta* the Court considered the case of a criminal defendant who was required to present his defense exclusively

> through counsel. The Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel *and that he is able and willing to abide by rules of procedure and courtroom protocol.* (emphasis added)

Applying this rule, there are many cases in which courts properly refused to permit a Petitioner to appear pro se because he or she indicated that proceedings might be disrupted or that the Petitioner had another purpose in mind other than fairly presenting a defense. See e.g., *United States v. Cauley*, 697 F.2d 486, 491 (2d Cir. 1983) (court properly refused to allow disruptive defendant to dismiss legal aid lawyer in the middle of trial and proceed pro se); *United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989) (court properly terminated pro se proceedings and appointed stand-by counsel because defendant flouted responsibility to act as officer of court by characterizing district court as "home team" on side of government); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (court did not abuse its discretion by revoking defendant's pro se status because defendant's conduct made it "practically impossible" for the trial to proceed; "when a defendant's obstreperous behavior is so disruptive that the trial can ot move forward, it is within the trial court's discretion to require the defendant to be represented by counsel").

In a case very similar to this one, *People v. Anderson*, 133 A.D.2d 120, 121, 518 N.Y.S.2d 658 (2d Dept. 1987), the Defendant insisted on the right to appear pro se and the judge made inquiry into his ability to do so. But the trial court was alerted to the fact that the Petitioner would be disruptive. Ultimately, the Petitioner acted in such an unruly manner that he was removed from the courtroom. "The trial proceeded to its conclusion without the presence of either the Petitioner or his stand-by counsel in the courtroom and without any defense being presented." 133 A.D. 2d at 121. The Appellate Division reversed the resulting conviction.

> . . . part of the purpose of appointing stand-by counsel – which can be done even over the objection of the accused – is to have an attorney available to represent the accused in the event that termination of the Petitioner's self-representation becomes necessary. . . .
>
> Here, given the early warning signs of trouble, the court should not have dismissed the Petitioner's stand-by counsel, who could have taken over the defense once the Petitioner's conduct had forced the court's hand. *Id.* at 121.

In *Faretta* this Court noted the protections that must be imposed if a pro se defendant acts improperly.

> . . . the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See *Illinois v. Allen*, 397 U.S. 337. Of course, a State may--even over objection by the accused -- appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See United States v. Dougherty, 154 U.S.App.D.C. 76, 87--89, 473 F.2d 1113, 1124--1126.

422 U.S. at 834, n. 46

Thus the proper steps that a court must take in accordance with the requirements of the 5th and 6th Amendments is (1) to allow pro se representation so long as the defendant is competent and prepared to follow court rules; (2) to terminate pro se representation if the defendant acts in a disruptive manner (*Faretta, Allen*); (3) but if pro se representation is terminated, standby counsel must be appointed and allowed to assume responsibility for the case (*Allen*). That is what happened in all of the cases cited above. See also Justice Scalia's comments at the oral argument in *Indiana v. Edwards*, cited above.

In this case, as noted above, the judge was certainly aware of the possibility, indeed the

probability of "obstructionist conduct." He foresaw exactly what happened:

> You are aware that if I grant your application, [to appear pro se] and I am disposed to do so, that if there comes a time where I am required as I see fit by reason of your conduct to remove you from the courtroom, you will, at that juncture, be unrepresented. Are you aware of that significance? App. 47-48..

In this case, the Second Circuit found that there was no constitutional violation based on an earlier precedent that simply did not match the current situation. In *Torres v. United States*, 140 F.3d 392 (2d Cir. 1998), the defendant Marie Beltran Torres, a supposed member of the FALN, the revolutionary Puerto Rican organization, refused counsel, and she did not participate in any way during the proceedings. But the trial judge in that case appointed an amicus lawyer on her behalf to argue difficult issues concerning the ability of the jury to determine the sentence under 18 U.S.C. § 34. During the second day of testimony, the District Court took the highly unusual step of appointing a private lawyer, Arthur Viviani, as amicus curiae. [*Torres v. United States,* Second Circuit Docket No. 97-2061, Joint Appendix "JA" 353] The District Court instructed Viviani to assume responsibility for arguing a defense position regarding sentencing.

The jury found Torres guilty and found that she should be sentenced to life imprisonment. The District Court (Knapp, J.) then held a series of post-trial proceedings. It asked the *amicus* to brief the question whether Ms. Beltran had a meaningful opportunity to waive her right to counsel. [JA 620-21] The Court explained that it was concerned that "there is a serious question of whether or not this judgment or this phase of the judgment should or should not be set aside." [JA 622] The District Court then sentenced Ms. Beltran to life in prison. [JA 626]. Pursuant to the District Court's request, Viviani filed a brief supporting the *sua sponte* post-trial motion on the right to counsel issue and argued for a new trial on a number of grounds, including that Ms. Beltran had not properly waived her right to counsel. [JA 634-42] The District Court denied the motion. But he ordered that a notice of appeal be filed on her behalf

In this case, no appointment of an *amicus* occurred. No argument of any kind was made before the state court as to the adequacy of the determination that Petitioner was competent to waive and had properly waived her right to counsel. No notice of appeal was filed on her behalf. None of those protections were afforded Petitioner in this case.

In view of the importance of the issue surrounding pro se representation in its numerous manifestations as described above, this Court should grant review. It is simply unthinkable that

a trial can proceed with no one in the courtroom to defend a defendant's interest. As the district court noted, "The proceedings at issue, with no one sitting at the defense table during the prosecution's entire case, would have appeared unfair to many people with knowledge of the constitutional right to counsel or a respect for our adversarial system of justice." App. 120

B. The Second Circuit Did Not Properly Follow This Court's Rule in *Lee v. Kemna* With Respect to the "Exorbitant Application" of State Procedural Rules

The District Court found that any procedural default in this case was excused under the principles of *Lee v. Kemna* as interpreted by the Second Circuit decision in *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2001), It noted that New York law (NYCPL § 440.10(2)(c)), bars any post-conviction remedies if there was an "unjustifiable failure" to file a notice of appeal from the original conviction. A "justifiable failure" would be the result of ineffective assistance of counsel, according to the Practice Commentaries to the law. (See discussion in App. 109). The District Court thus concluded: "Although Clark's case does not turn on the ineffective assistance of trial counsel, the same excuse exists where defendant had *no trial counsel at all* combined with an obvious unwillingness to represent herself in accordance with court rules and procedures." App. 109. The court noted that the New York Court of Appeals had explained that the reason for the rule

"is not hard to discern the Petitioner's right to appeal may be less than real if counsel is not at hand to advise him of that right or to take the necessary steps to perfect and prosecute that appeal." *People v. Silverman*, 3 N.Y.2d 200, 201 (1957). The district court concluded:

> This principle has direct relevance to Clark's situation -- although there were various lawyers and legal advisors in her vicinity, there was no person with an ethical duty to provide counsel to Clark, during or after her trial. Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might have been different. Because Clark's failure to appeal was "justifiable" given the rare circumstances of her case, application of the procedural bar in section 440.10(2)(c) was not demanded.. App. 110.

The district court followed the guidelines established in the *Lee v. Kemna* case to determine whether "exorbitant application" of the state procedural rule was necessary. In that case the court established certain guidelines for determining when strict procedural requirements may be too "exorbitant." The three guidelines include (1) whether "perfect compliance" with the state procedural rule would have changed the result in the case, 534 U.S. at 381; (2) whether "flawless compliance" with the state procedural

rule in the "unique circumstances of the case" was required by state law, *id*, at 382; (3) finally given the "realities" of the exact situation before the court did the defendant "substantially comply" with the state procedural rule. *Id.*

The district found that all three conditions were met. First, perfect compliance with the state procedural rule would not have changed the result in the 440.10 motion since the state judge would have rejected the claim on the merits, as the state judge explicitly found. See App. 106-07.

Second, under the unique circumstances of this case, "flawless compliance" with the state rule was not required. "Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might have been different." App. 108.

Finally, Petitioner asserts that she "substantially complied with the rule given the particular circumstances of her case." In other words, "the rule's application to bar her claim was therefore both incorrect as a matter of state law and also inadequate to bar federal habeas review." App. 111. It noted that the "governmental interests at stake in section 440.10 would not constitute legitimate interests in the particular circumstances of this case -- where the procedural bar was automatically applied to prevent consideration of a section 440 motion even though

petitioner's failure to appeal could be considered 'justifiable' given the trial court's error in permitting her to proceed pro se when she was not 'able and willing to abide by the rules of procedure and courtroom protocol.'" {citing *McKaskle*, 465 U.S. at 173. See App. 112.

The Second Circuit in a brief examination held that "perfect compliance" with the appeal requirements was necessary. "Under these circumstances, the state court's application of the requirement that claims be raised on direct appeal can hardly be described as 'exorbitant.'" App. 15.

C. The Complete Lack of Counsel in This Situation Constitutes "Cause" Which Excuses the Procedural Default

Viewed in another perspective, the reason for the procedural default in this case was directly related to the constitutional violation, namely the lack of counsel. Under other circumstances, if a constitutional violation led to a procedural default, courts have found the violation to be the "cause" of the default, excusing the violation under the "cause" and "prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977). [2]

---

[2] Petitioner raised the "cause and prejudice" issue before the district court, which did not rule on the matter, in view of its holding that there was no procedural default. The Second Circuit also referred to that issue and in an astonishing prediction, reached out to decide the merits on the

This Court noted that true ineffectiveness of counsel, as an independent constitutional violation, may constitute "cause" that would excuse any procedural violation. "Although we have not identified with precision exactly what constitutes 'cause' to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice." *See Edwards v. Carpenter,* 529 U.S. 446, 451 (2000). This Court went on to explain that: "Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution."

If there is an independent constitutional violation in other situations – such as an improper decision to allow pro se representation or the failure to appoint stand-by counsel -- such violations should also constitute "cause" under the *Wainwright v. Sykes* rule. As the District Court concluded, "Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might

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assumption that the district court would excuse any procedural violation by applying the "cause and prejudice" standard. It noted: "Moreover, it appears that, on remand, the district court would excuse Clark's procedural default under a theory of cause and prejudice, and so we reach the merits." App. 14

have been different." App. 101

The same reasoning applies in both situations (ineffectiveness and lack of counsel). Counsel is necessary to discover and follow the state procedural rules. If the counsel is constitutionally inadequate or not present at all, there is a plausible reason why procedural default occurred. And it therefore should be excused

This Court has equated the complete lack of counsel with ineffectiveness claims, see discussion in *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932) (suggesting that a lawyer's representation can be so ineffective that it is equivalent to a complete lack of counsel). Indeed this Court has found that the complete lack of counsel -- when it was required – cannot lead to any adverse legal consequences. *See e.g, .United States v. Tucker*, 404 U.S. 443 (1972)(prior conviction obtained in violation of the *Gideon* rule cannot be basis for additional prison sentence under recidivist statute).

This Court should review this case to examine the scope of the *Lee* standard in the habeas area. It should also determine what happens when other constitutional violations lead to procedural default. Should such additional violations constitute "cause" under the "cause and prejudice" standard?

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
June 2, 2008

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APPENDIX A

Second Circuit Decision

United States Court of Appeals,Second Circuit.
Judith CLARK, Petitioner-Appellee,
v.
Ada PEREZ, Superintendent, Bedford Hills Correctional Facility, Andrew Cuomo, Attorney General, State of New York, Respondents-Appellants.

Argued: Feb. 26, 2007.
Decided: Jan. 3, 2008.

Lawrence Lederman, Milbank, Tweed, Hadley & McCloy, New York, NY, and Leon Friedman , New York, NY, for Petitioner-Appellee.

Michael E. Bongiorno, District Attorney, Rockland County (Ann C. Sullivan, Special Assistant District Attorney, on the brief), New City, NY, for Respondents-Appellants.

Before: JACOBS, Chief Judge, LEVAL, and SOTOMAYOR, Circuit Judges.

DENNIS JACOBS, Chief Judge:

Respondent officials of the State of New York (the "State"), appeal from the 2006 grant by the United States District Court for the Southern District of New York (Scheindlin, *J.*) of Judith Clark's petition for a writ of habeas corpus, which

challenged a 1983 judgment of the New York Orange County Court convicting Clark of three counts of Murder in the Second Degree under New York Penal Law § 125.25, six counts of Robbery in the First Degree under New York Penal Law § 160.15, and other lesser crimes. At her criminal trial, the trial court permitted Clark to defend herself *pro se* after an inquiry into whether her election to do so was competent, knowing and intelligent; but in an act of political protest, Clark and her co-defendants absented themselves from the courtroom through nearly all of the pre-trial proceedings and the trial itself, listening to the proceedings through a speaker in their holding cells. Clark never filed a direct appeal in state court. The district court ruled that Clark's failure to appeal her convictions under the circumstances was an inadequate state procedural bar to federal review, and that the trial court violated Clark's Sixth Amendment right to counsel by allowing her trial to proceed without either appointing stand-by counsel or terminating Clark's *pro se* representation altogether.

First, we hold that Clark's failure to timely appeal her conviction was an adequate state procedural bar foreclosing federal review of the merits of her Sixth Amendment claim absent a showing of cause and prejudice, and there was no prejudice. Second, we hold that Clark's Sixth Amendment claim is without substantive merit. If Clark was without certain protections guaranteed by the Constitution, that was because she knowingly and intelligently exercised her

constitutional right to make those choices. The district court's ruling on the merits conflicts with this Court's holding in *Torres v. United States,* 140 F.3d 392 (2d Cir.1998), and with the Supreme Court's holding in *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The judgment of the district court is reversed.

BACKGROUND

The facts of this case are set forth more fully in the district court opinion. *Clark v. Perez,* 450 F.Supp.2d 396, 402-13 (S.D.N.Y.2006).

A

At the time of the underlying offenses, Petitioner-Appellee Judith Clark was a member of a radical leftist revolutionary group calling itself the Weather Underground. On October 20, 1981, a group of heavily armed men-some or all of whom were members of the Black Liberation Army revolutionary organization-robbed an armored truck in Nyack, New York. In a surprise assault, they shot two security guards, killing one and severely wounding the other. The robbers also shot and killed two policemen who attempted to stop the getaway vehicles on the highway. Clark was a driver of one of the getaway vehicles; she and two of her co-conspirators were captured after she crashed. In the moments before her capture, police saw Clark reach for a nine-millimeter pistol on the floor of the car. This appeal focuses not on

the details of Clark's involvement in the robbery but on the events at her trial in 1983 alongside co-defendants Kuwasi Balagoon and David Gilbert.

B

At a pretrial conference on June 2, 1983, Judge Ritter of the Orange County Court considered applications to appear *pro se* made by Clark, Balagoon and Gilbert. At the outset of the hearing, the three, who were then represented by counsel, protested that their supporters in the audience had been assaulted and arrested by security personnel, and announced to the court that they would proceed no further until their supporters were freed and brought back into the courtroom. The judge asked the defendants to proceed with the hearing and conform themselves to rules of courtroom decorum. Clark and the others refused and were escorted from the courtroom, as a contingent in the audience rose, chanted slogans, and marched out, accompanied by the defendants' lawyers (who had no permission from the court to leave).

Later that day, the defendants returned to the courtroom for the purpose of pressing their applications to defend themselves *pro se*.The court instructed Clark that she would be allowed to remain in the courtroom only if she observed rules of courtroom decorum and agreed to refrain from disrupting the proceedings. Clark's response was equivocal:

> We have conducted ourselves and we continue to conduct ourselves with all the respect that revolutionaries and freedom fighters will always conduct themselves, respect for ourselves.... I have no reason to be disruptive in this situation. My purpose to be here at all was to fight for my right to represent myself because I am a freedom fighter.... Because I am the only one who can speak for myself.... I am very much hoping that the Court does not create a provocative situation and unprovoked, I have no intention of disrupting the situation.

The judge warned the defendants about the perils of self-representation by a layman, and told them that he considered it unwise for them to conduct their own defense in so complicated a case. He reminded them that their decision to represent themselves would in no way relieve them from the obligation to observe decorum, and warned them that if he was forced to remove them from the courtroom, they would have no representation whatsoever.

Turning to Clark, the trial judge asked whether she understood the implications of her decision, whether she suffered from any mental or physical impairments that would make it difficult for her to understand the proceedings, and whether she had reflected upon her decision. Clark asserted: "I wish to represent myself because as a freedom fighter I am the only one

who can speak for myself and I can definitely not be represented by an officer of the court." Clark's then-attorney, Susan Tipograph, offered her opinion that Clark was fully competent to make the decision to represent herself *pro se*.

C

After Clark was no longer represented by Tipograph, the court granted Clark's request to retain Tipograph as a legal advisor. Ultimately, both Tipograph and Balagoon's former counsel, Judith Holmes, acted as legal advisors to all three defendants (the co-defendants having waived any potential conflicts).

At voir dire, the defendants protested the limitations on their opportunity to confer with each other and their legal advisors about their collective strategy. Clark announced to the judge on the first day of jury selection (July 20, 1983) that she and her co-defendants would not attend voir dire unless they could meet regularly. The judge told Clark that they had an absolute right to be present at all stages of their trial, but that they could waive that right by refusing to attend. On the second day of voir dire, they showed up only briefly to protest the lack of arrangements for defendants' meetings; they were removed from the courtroom. They attended court on the third day.[FN1] The following day, they left early, protesting the anonymity of the juror panel and the judge's restrictions on the defendants' questioning of prospective jurors, much of which

focused on the jurors' knowledge of "New Afrika" and other leftist revolutionary doctrine. The defendants refused to attend the remaining seven days of voir dire.

> FN1. At one point on the third day of voir dire, in Clark's presence, legal advisor Judith Holmes sought to make an argument to the court about the circumstances under which the legal meetings were being conducted. Pursuant to the defendants' decision to represent themselves *pro se,* the judge did not permit Holmes to speak on the defendants' behalf, telling her that her role as a legal advisor was to offer advice and not act as an advocate or spokesperson.

When they absented themselves, the defendants were able to listen to proceedings over a speaker in their holding cells, and every morning the judge announced on the record that the defendants had elected to absent themselves, but could return whenever they wished.

D

Balagoon's opening statement focused on political ideology, his background as a revolutionary, and his belief that the United States was a fascist and racist nation. After multiple objections from the prosecution, the trial judge ordered Balagoon to confine his comments to what would be proven at trial; Balagoon left in

protest. Clark and Gilbert announced they were likewise unwilling to continue. Clark explained her decision to leave in the presence of the jury:

> Number one, I am an anti-imperialist freedom fighter. I don't recognize the legitimacy of this Court. Second of all, I am not going to continue here just as though everything was just proper when what's obvious is obvious, which is, that the truth about the question of New Afrika is not allowed to be spoken in this courtroom.

The trial judge advised the defendants (outside the jury's presence) that he would allow them to withdraw and listen in from their holding cells because that was their choice to make, but that they could come back whenever they chose, provided that they would observe the rules of the court.

The prosecution put on its case in the defendants' absence; the defense table was empty throughout the prosecution's case and no objections were interposed by the defense. At the start of each day, the trial judge made a record that the defendants were electing to stay away, that they could return when they wished, that the speakers were activated, and that the defendants could inform the judge anytime they wished to return.

On two occasions, the defendants entered the courtroom (with their legal advisors), seeking

prisoner-of-war status, the production of incarcerated witnesses who were "New Afrikan prisoners of war," and (presumably in the alternative) change of venue "to a friendly country." Relief was denied, except that the government was ordered to produce incarcerated Black Liberation Army member Sekou Ondinga to testify for the defense. With legal advisors present, Balagoon conducted a direct examination of Ondinga, which concerned the notion of New Afrika, the history of slavery in the United States, Ondinga's work as a "freedom fighter" with the Black Liberation Army, torture he suffered at the hands of American police, and his contention that he was a prisoner of war. Clark herself asked Ondinga a single question, relating to what responsibilities white Americans had to assist New Afrikans in their freedom fight. The defense called no other witness.

Clark's ten-page summation was a revolutionary political statement. Among other things, Clark told jurors that she wished to make

> [j]ust a few remarks about what has happened during this trial to give you a different p[er]spective ... on what has gone on here. And while the p [er]spective represented by the Judge and D.A. is one that holds power and therefore determines what happens here, we are struggling to bring to light a radically different p[er]spective on the facts and fictions presented here. Perhaps it will not change

> your minds, those of you who sit in the jury box, but perhaps it will shed new light on some[ ]things now as well.... One way that it was apparent was by our absence because we did not want to lend credence to this ritual, because this Court is a tool of imperialist rule. It is not here to protect the interests of working people, but to protect the property rights in control by the rich and to repress oppressed peoples and dissidents when they rise up.... The D.A. calls what happened on October 20, 1981, a robbery and murder. We say it was an attempted expropriation because revolutionary forces must take from the powers that be to build their capabilities to struggle against this system.... The D.A. says this isn't a political case. We say and I contend that political considerations have determined the actions of the State just as much as they have determined our conduct during this trial.... Revolutionary violence is necessary and it is a liberating force.... Soon this charade they call a trial will be done. The Judge will charge and tell you to do your duty as a juror as they tell you as marines in Lebanon to do their duty.

The defendants declined to submit jury charges. Defendant Gilbert explained that, as they "consider[ed] the proceedings illegitimate," they had "no interest about getting into arguments with you about how you charge the jury, as you would do in your own purposes in any

case." The jury returned a guilty verdict on September 14, 1983.

At the sentencing, Clark and her co-defendants left the courtroom before the court pronounced the sentences; the court instructed the clerk to inform the defendants of their right to direct appeal.

Clark, however, never took one.

E

In December 2002, nineteen years later, Clark moved to vacate her convictions under New York Criminal Procedure Law section 440.10. Her motion recited regret for her actions and repudiated the choices she had made as a younger woman. Statements from psychologists advanced the argument that for years, she had been incapable of taking the necessary steps to appeal her case due to her initial depression in confinement, as well as her psychological inability to let go of her revolutionary belief system and to defy the expectations of her associates.

As to the merits, Clark argued that the trial judge had violated her constitutional rights by (1) allowing her to appear *pro se* notwithstanding her obvious unwillingness to obey the court's rules, (2) failing to appoint stand-by counsel once it became obvious that she would need to be removed from the courtroom, and (3) allowing the proceedings to continue when no one was left in the courtroom to

represent her.

Rockland County Supreme Court denied her motion in September 2003. The court explained that the trial judge acted properly in accepting Clark's valid decision to represent herself and her voluntary decision to absent herself from trial, and had done everything that the Constitution required by assuring that Clark (1) had access to legal advisors, (2) could listen to the proceedings, and (3) could return to the court whenever she wished. The state court added: "[W]ere the court to consider defendant's claim of a deprivation of her constitutional right, it would find the claim completely meritless."

At the same time, the court made clear that it was denying Clark's motion to vacate because she had unjustifiably failed to raise the issue on appeal-a failure that mandated denial of the motion to vacate under New York Criminal Procedure Law section 440.10(2)(c) because her claim was based on facts contained in the trial record. The court rejected the notion that the petitioner's psychological inability to retreat from her political belief system was a valid justification for her failure to take an appeal.

Clark's motion for leave to appeal in the New York Appellate Division was summarily denied on January 20, 2004.

Clark filed a habeas petition in the United States District Court for the Southern District of

New York on January 20, 2005, which was granted by Judge Scheindlin on September 22, 2006. *See Clark,* 450 F.Supp.2d 396. This appeal followed. We discuss the district court's various rulings as they become relevant in the course of this opinion.

DISCUSSION

The grant or denial of habeas corpus is reviewed *de novo,* and the underlying findings of fact are reviewed for clear error. *Jackson v. Edwards,* 404 F.3d 612, 618 (2d Cir.2005).

The State challenges the district court's decision on the grounds that (1) even though the State failed to raise as a defense the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), the district court should have dismissed the petition as untimely, either *sua sponte* or by the granting of the State's motion for leave to amend; (2) Clark's failure to take a timely appeal constituted an adequate and independent state procedural bar to post-conviction relief under New York Criminal Procedure Law section 440.10(2)(c); (3) as a matter of federal law, Clark failed to exhaust the available remedies by raising her claim in a timely appeal; (4) AEDPA deference should have been afforded because the state courts denied Clark relief on the merits; (5) the petition was barred by laches; and (6) the trial court did not violate Clark's Sixth Amendment right to counsel.

We sustain the State's appeal because the district court erred in holding that Clark's failure to appeal constituted an inadequate state procedural default. Moreover, it appears that, on remand, the district court would excuse Clark's procedural default under a theory of cause and prejudice, and so we reach the merits. Clark's Sixth Amendment claim is defeated by *Torres v. United States,* 140 F.3d 392 (2d Cir.1998). A criminal defendant who has competently invoked the right to appear *pro se* may mount a defense consisting of nothing more than a protest against the court's legitimacy and a refusal to attend trial, and has no Sixth Amendment right to be protected from the prejudice that may result.[FN2]

> FN2. Because we hold that the district court erred on the above-described grounds, we find it unnecessary to reach the State's additional challenges.

I

The district court held that:

> Given the lack of representation in the courtroom during critical portions of petitioner's criminal trial, ... the application of [New York's requirement that issues arising from the face of the record be raised on direct appeal] was not demanded in these particular circumstances and is not adequate to prevent federal habeas review.

Clark, 450 F.Supp.2d at 428. The court thus cast the claim in terms of ineffective assistance of counsel, reasoning that New York courts do not apply the procedural bar regularly to ineffective assistance claims, which often depend on extrinsic evidence and therefore must be brought through collateral attack rather than by direct appeal.

That, however, is not the case here. Direct appeal was available to Clark because her claim is based on facts visible on the face of the trial record. Indeed, Clark's chief justification for failing to appeal was her continued boycott of the judicial system-not the need for extrinsic evidence. Under these circumstances, the state court's application of the requirement that claims be raised on direct appeal can hardly be described as "exorbitant." *Lee v. Kemna,* 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). It was therefore error to hold that the state procedural rule was not "adequate" to bar federal review of Clark's petition.

A

Ordinarily, a federal habeas court may not reach the merits if the state court's rejection of a federal claim "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).[FN3] State procedural default also bears on the federal exhaustion requirement for habeas

petitions. *See*28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus. shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State."). Specifically, when a "petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred," the federal habeas court should consider the claim to be procedurally defaulted. *Coleman,* 501 U.S. at 735 n. 1, 111 S.Ct. 2546. We have thus applied New York's procedural default rules in the first instance, pursuant to the exhaustion requirement for federal habeas. *See, e.g., Jimenez v. Walker,* 458 F.3d 130, 148-49 (2d Cir.2006); *St. Helen v. Senkowski,* 374 F.3d 181, 183 (2d Cir.2004) (per curiam); *Sweet v. Bennett,* 353 F.3d 135, 139-40 (2d Cir.2003). Section 440.10(2)(c) is one of the procedural default rules we so apply.

> FN3. The parties do not dispute that section 440.10(2)(c) was an independent state bar to review of the merits. The issue is solely its adequacy under the circumstances.

To determine whether a state procedural bar is "adequate to support the judgment," *Coleman,* 501 U.S. at 729, 111 S.Ct. 2546, a federal habeas court should look to whether "the state rule at issue ... is firmly established and regularly followed." *Garvey v. Duncan,* 485 F.3d

709, 714 (2d Cir.2007). This inquiry focuses on whether the case before the court fits within the limited category of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question," *Lee,* 534 U.S. at 376, 122 S.Ct. 877. *See also Garvey,* 485 F.3d at 718; *Monroe v. Kuhlman,* 433 F.3d 236, 241 (2d Cir.2006).

We look to several "guideposts" in measuring "the state interest in a procedural rule against the circumstances of a particular case." *Lee,* 534 U.S. at 386-87, 122 S.Ct. 877. Those guideposts, or *Cotto* factors, are:

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had "substantially complied" with the rule given "the realities of trial," and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir.2003) (citing *Lee,* 534 U.S. at 381-85, 122 S.Ct. 877).

These considerations are obviously rooted

in the context of procedural defaults at trial, and are so formulated. *See id.* at 240-42 (concerning a failure to preserve an issue for review through a contemporaneous objection at trial); *Lee,* 534 U.S. at 381-85, 122 S.Ct. 877 (concerning denial of a trial continuance where petitioner ignored the applicable state procedural rule). The trial record has little or no bearing when the procedural bar arises *after* trial, as when no appeal is taken. Nevertheless, in at least one case, we consulted the *Cotto* factors in reviewing a state court's decision that rejected a federal claim on collateral review because it was not raised on direct appeal. *See Murden v. Artuz,* 497 F.3d 178, 192-93 (2d Cir.2007). But the *Cotto* factors are not a three-prong test: they are guideposts to aid inquiry, *see Monroe v. Kuhlman,* 433 F.3d 236, 242 (2d Cir.2006); so there is no need to force square pegs into round holes. Here, only the second of the *Cotto* guideposts is germane to a state court's denial of collateral review on the basis that a petitioner failed to file any direct appeal whatsoever.[FN4]

> FN4. The first guidepost has no bearing here because the failure altogether to raise an issue cannot be "actually relied on" because no court has been notified that the issue even exists. The district court analysis focused on the state court that decided Clark's motion to vacate. *See Clark,* 450 F.Supp.2d at 426. But that decision is irrelevant to the first *Cotto* guidepost, which looks to the decision of the judge

> *before whom the procedural violation occurred,* not the decision of the last state court to deny relief because of an earlier procedural default.
>
> As to the third guidepost, the district court reasoned that what it perceived to be a constitutional violation impacted the "realities of trial" to such a degree that Clark's failure to appeal constituted substantial compliance with state procedural rules. *Clark,* 450 F.Supp.2d at 428 (quoting *Cotto,* 331 F.3d at 240). This was erroneous because Clark's failure to file *any* appeal constituted total noncompliance with the requirement that issues arising from the face of the trial record be raised by direct appeal. By definition, total noncompliance cannot also be "substantial compliance."

B

The second *Cotto* factor considers whether state case law indicates that compliance with a procedural rule was required under the specific circumstances of the case. Of course, state courts will usually be best positioned to answer this question; but our independent review of state case law is needed to ensure that the application of a state procedural rule to bar federal review of the merits in a particular case is not "an arid ritual that would further no perceivable state interest." *Richardson v. Greene,* 497 F.3d 212, 218 (2d

Cir.2007) (internal quotation marks and formatting omitted).

New York law provides that a notice of appeal from a conviction must be filed within thirty days of judgment, N.Y.Crim. Proc. Law § 460, and that a motion to vacate based on facts visible on the trial record must be dismissed where the defendant unjustifiably failed to raise the issue on direct appeal. N.Y.Crim. Proc. Law. § 440.10(2)(c) (the text is in the margin).[FN5] The state court applied section 440.10(2)(c) to Clark's motion to vacate, determining that her failure to raise her Sixth Amendment claim on direct appeal was unjustifiable because the facts relevant to that claim appeared on the face of the trial record.

FN5.N.Y.Crim. Proc. Law. § 440.10(2)(c) provides in relevant part:

> the court must deny a motion to vacate a judgment when: ... Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him....

The district court concluded that the state court's application of section 440.10(2)(c) was not "adequate to support the judgment" against Clark because Clark's failure to appeal was not "unjustifiable." *Coleman,* 501 U.S. at 729, 111 S.Ct. 2546. The district court observed that New York State courts deem justified the failure to raise ineffective assistance of appellate counsel on direct appeal, and reasoned that this justification exists *a fortiori* "where defendant had no *trial counsel at all* combined with an obvious unwillingness to represent herself in accordance with court rules and procedures." *Clark,* 450 F.Supp.2d at 427. To support this idea, the district court cited two aged New York cases and one statutory provision. In *People v. Howard,* 12 N.Y.2d 65, 236 N.Y.S.2d 39, 187 N.E.2d 113 (1962), the New York Court of Appeals noted in *dicta* that where a defendant has "actually" been deprived of the right to counsel at trial, the failure to take an appeal would not bar the grant of coram nobis because "the defendant's right to appeal may be less than real if counsel is not at hand to advise him of that right or to take the necessary steps to perfect and prosecute the appeal." *Id.* at 67, 236 N.Y.S.2d 39, 187 N.E.2d 113. Here, Clark does not claim that she misunderstood her right to appeal, or that legal advisors were unavailable to her-and in any event, a lawyer cannot force a client to appeal, even if Clark were open to suggestions and advice. In *People v. Silverman,* 3 N.Y.2d 200, 165 N.Y.S.2d 11, 144 N.E.2d 10 (1957), a hearing on a

petition for coram nobis was granted where a lawyer was forced on an unwilling client, an issue that the defendant did not raise on appeal. *Silverman* does not support the inadequacy determination here for two reasons: Silverman's claim was not based solely on matters appearing in the trial record; and Silverman was represented on his direct appeal by the same lawyers forced on him at trial.

The district court also relied on New York Criminal Procedure Law, reasoning that, because section 440.10 was designed to incorporate the common law writ of coram nobis, and because section 440.10(3)(a) and coram nobis case law make particular exceptions to procedural default where a claim is based on a deprivation of the right to counsel, the link between coram nobis and section 440.10 "could also be relevant" to the requirement that a timely appeal be taken where a claim appears on the face of the record. *Clark,* 450 F.Supp.2d at 427-28 n. 218. Section 440.10(3)(a) says what happens when the reason a ground for appeal does not appear on the face of the trial record is the defendant's failure to make the record, and provides that denial of the writ on that basis is impermissible where the claim is based on a deprivation of the right to counsel. This provision is categorically irrelevant here: Clark's claim is based on matters that appear all over the face of the trial record.

We conclude that the district court erred in holding that the state court's application of

section 440.10(2)(c) did not constitute an adequate state procedural bar to Clark's federal habeas petition. Moreover, even if no state court had applied section 440.10(2)(c) to Clark's claim, the district court itself should have done so in the first instance pursuant to the exhaustion requirement for federal habeas. *See, e.g., Sweet,* 353 F.3d at 140 (applying section 440.10(2)(c) to claims raised for the first time in federal habeas petition).

C

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States,* 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (citations and internal quotation marks omitted), *quoted in DiSimone v. Phillips,* 461 F.3d 181, 190 (2d Cir.2006). Actual innocence is not in issue here; so cause and prejudice analysis is the only route to the merits. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded ... efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Because the district court had no occasion to consider whether any objective factor external to Clark impeded her appeal, we could remand for such a determination. *See, e.g., McKethan v. Mantello,*

292 F.3d 119 (2d Cir.2002) (holding that claims were procedurally barred through improper exhaustion and remanding for the district court to dismiss on the merits or apply cause and prejudice analysis). But the district court's conclusion that, under state law, Clark was justified in her failure to appeal makes plain that any cause and prejudice inquiry on remand would be bound up in the merits of Clark's claim. In the district court's view, the purported constitutional violation itself-allowing Clark to act *pro se* without appointed or stand-by counsel-was the primary reason Clark failed to timely appeal; this would be an "external" factor only if it were truly a violation. As we discuss *infra,* however, the circumstances at Clark's trial gave rise to no violation of the right to counsel; we dispose of the remainder of the appeal on the merits because a remand would be futile.

II

Clark argues that the trial court violated her Sixth Amendment right to counsel by (1) allowing her to represent herself when it was clear that she would not abide by courtroom protocol and (2) allowing her to represent herself without stand-by counsel after she absented herself from the courtroom as a political protest against the trial court's legitimacy. The district court accepted Clark's argument.

We rejected an identical claim in *Torres v. United States,* 140 F.3d 392 (2d Cir.1998).

A

Before turning to the merits of Clark's claims, we resolve the threshold issue of whether the district court erroneously withheld AEDPA deference from the state court decision. In order to determine whether to apply AEDPA deference, habeas courts examine "(1) the face of the state-court opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances," and then decide whether the state court's decision was "(1) fairly appearing to rest primarily on federal law or to be interwoven with federal law or (2) fairly appearing to rest primarily on state procedural law." *Jimenez,* 458 F.3d at 145 & n. 16 (2d Cir.2006). The habeas court looks to the last state court decision rendering a judgment on the petitioner's federal claim. *See Messiah v. Duncan,* 435 F.3d 186, 195 (2d Cir.2006). Unless this last decision clearly relies on a state procedural ground, the claim was decided on the merits and AEDPA deference applies. *Id.*

Here, we have two state court decisions. First, the Rockland County Supreme Court opinion cited Clark's unjustifiable failure to take an appeal under section 440.10(2)(c) as a procedural bar to the review of the merits of her claim. That court did discuss the merits in detail, but the discussion was by way of explanation for the statement that "were the court to consider defendant's claim of a deprivation of her

constitutional right, it would find the claim completely meritless." By its own terms, therefore, the Rockland County Supreme Court announced that it was not basing its judgment on the merits of Clark's federal claim, but on a state procedural bar.

The Appellate Division then denied Clark leave to appeal, without comment. The State argues that this was the decision that disposed of Clark's claim. But the denial of *leave* to appeal does not speak directly to the soundness of any particular reasoning below; even if leave to appeal were granted, the court might deny relief on the merits. There is no reason to assume that leave to appeal was denied for any reason other than agreement with the lower court's application of the state procedural bar.

Accordingly, we review the merits of Clark's habeas petition *de novo.*

B

"The [Sixth Amendment] right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison,* 477 U.S. 365, 374, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562

(1975). The defendant's right to counsel does not generally empower courts to force counsel upon a criminal defendant. The Sixth Amendment "contemplate[s] that counsel ... shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820, 95 S.Ct. 2525. A defendant therefore has a constitutional right to waive the right to assistance of counsel and present her own defense *pro se,* if the decision is made "knowingly and intelligently." *Id.* at 835, 95 S.Ct. 2525 (internal quotation marks omitted). The record should reflect that the choice was made with an "aware[ness] of the dangers and disadvantages of self-representation." *Id.*

The right to self-representation may tend to run at cross-purposes to the right to effective assistance of counsel. *See id.* at 832, 95 S.Ct. 2525. For this reason, we exercise caution when called upon to establish *per se* rules that might overprotect either of these rights.

As it stands, the right to self-representation is not without limits. The right "is not a license to abuse the dignity of the courtroom." *Id.* at 834 n. 46, 95 S.Ct. 2525. A trial court may deny the right to act *pro se* where the defendant "deliberately engages in serious and obstructionist misconduct,"*id.,* or is not "able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins,* 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Even if the right has been validly invoked, a judge may qualify it by appointing stand-by counsel, with or without the defendant's consent, to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary," *Faretta,* 422 U.S. at 834 n. 46, 95 S.Ct. 2525, or "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of [her] own clearly indicated goals." *Wiggins,* 465 U.S. at 184, 104 S.Ct. 944.

Stand-by counsel's participation is limited in two ways: (1) the defendant has the right to preserve actual control over the content of the case presented to the jury, and so standby counsel is not allowed to "make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance"; and (2) standby counsel's participation must not be allowed to destroy the jury's perception that the *pro se* defendant is representing herself. *Wiggins,* 465 U.S. at 178-79, 104 S.Ct. 944 ("[T]he right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised."). In addition, "there is no constitutional right to hybrid

representation," *United States v. Schmidt,* 105 F.3d 82, 90 (2d Cir.1997), whereby a defendant who represents herself can "choreograph special appearances by [standby] counsel." *Wiggins,* 465 U.S. at 183, 104 S.Ct. 944. Instead, "[t]he decision to grant or deny hybrid representation lies solely within the discretion of the trial court." *United States v. Tutino,* 883 F.2d 1125, 1141 (2d Cir.1989) (internal quotation marks omitted).

Clark also raises issues in connection with her absence from trial. A defendant has the right under the Confrontation Clause to be present when evidence is introduced against her, as well as a due process right "to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer,* 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The same disruptive and obstructionist conduct that may justify revocation of *pro se* status also serves as a constructive waiver of the right to be present at trial, provided that the trial judge warns the defendant that she will be removed if she persists and that the defendant is permitted to return to the courtroom at such time as she agrees to behave. *See Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

C

The district court held that the state trial court violated Clark's Sixth Amendment rights by accepting Clark's application to appear *pro se,*

notwithstanding clear indications that Clark had no intention of following the trial court's rules; and by allowing the trial to continue without revoking Clark's *pro se* status (or appointing standby counsel) after Clark refused to participate in or attend her trial. The district court's first holding implies that a waiver of right to counsel is constitutionally infirm where the record indicates that the defendant was unwilling to abide by courtroom protocol. The second implies that a trial court must, as a constitutional matter, construe a *pro se* defendant's waiver of the right to be present at trial as invalidating her waiver of the right to counsel.

We decline to adopt any such *per se* rules, and hold that there was no constitutional violation because Clark knowingly and intelligently waived her right to counsel, unequivocally asserted her right to self-representation, made a conscious strategic choice to waive her right to be present in the courtroom as part of a *de facto* political protest defense, and was afforded the opportunity to return whenever she chose.[FN6]

> FN6. The record suggests that the trial judge conducted himself admirably, handling the seriously disruptive and obstructionist conduct of Clark and her co-defendants with endless patience.

This conclusion flows directly from *Torres,* 140 F.3d 392, which held that near-identical facts

did not give rise to a Sixth Amendment violation. Torres, a member of the Puerto Rican nationalist revolutionary group FALN, was indicted in connection with a 1977 bombing in New York City. *See*140 F.3d at 395. Torres characterized herself as a "freedom fighter" and a "prisoner of war." *Id.* at 395-96. She refused to follow the court's rules, waived her right to counsel, and declined to participate in her own trial, choosing to withdraw to a holding cell where she listened to the proceedings on a speaker. *See generally id.* at 395-400. She called no witnesses and instead relied on her own political rhetoric challenging the court's illegitimacy. Her "trial tactics ... included leading courtroom demonstrations of political supporters in the gallery," and "[t]hroughout the proceedings, Torres spoke frequently, often restating her political beliefs." *Id.* at 402. She received assistance from legal advisors "at various stages of the proceedings,"*id.* at 396 n. 3, 397, but when she walked out during jury selection, her legal advisor followed.[FN7]

> FN7. The trial judge in *Torres* appointed *amicus* counsel to argue defendant's side of a particular sentencing issue; that argument took place outside of the presence of the jury. *Torres,* 140 F.3d at 397-98. At no point was Torres represented by counsel in the presence of the jury, even after she retreated to her holding cell.

In short, the facts in *Torres* closely mirror the circumstances of Clark's trial, as well as the

procedural context: Almost two decades after her conviction, Torres brought a federal habeas petition claiming that the trial court violated her Sixth Amendment rights by failing to revoke her *pro se* status (and appoint standby counsel) after she refused to follow the court's rules or appear at trial. She argued that as a result of that failure, her conviction was "entered pursuant to a non-adversarial proceeding," in violation of the Constitution. *Id.* at 402.

We observed that, "[b]y not participating in her trial, she was clearly trying not only to challenge the jurisdiction of the court, but also to incur political sympathy for her position." *Id.* Accordingly, we concluded that "Torres' decision not to participate in the proceedings did not undermine her knowing and intelligent waiver. Indeed, it is clear that she exercised her right to defend herself so that she could further her political objectives as a Puerto Rican freedom fighter." *Id.*

Torres emphasized "that the Sixth Amendment right to waive counsel, like all procedural protections for a criminal defendant, stems in part from the sanctity of freedom of choice." *Id.* Thus, "[j]ust as district courts should not compel a defendant to accept a lawyer she does not want, they should not interfere with the defendant's chosen method of defense." *Id.* (internal citations and quotation marks omitted).

Clark does not allege that her waiver of

counsel was anything less than knowing, intelligent, and unequivocal. Rather, like Torres, she complains that the trial judge violated her Sixth Amendment rights when he allowed her to appear *pro se* without invalidating or qualifying her waiver of the right to counsel after she had given ample notice of her intention to use a "disruptive, political defense," including an unwillingness to be present at trial. Appellee Br. at 5.

At oral argument, Clark's counsel conceded that Clark "adopt[ed] a conscious strategy to use [her] trial to further [her] political objectives and to challenge the jurisdiction of the court and win political sympathy." Oral Arg. Tr., February 26, 2007. The record confirms that Clark's trial was intensely adversarial. Clark introduced herself to the jury as "an anti-imperialist freedom fighter" who refused to "recognize the legitimacy of this Court." She then left the courtroom in protest. She petitioned the court for prisoner-of-war status. She moved (successfully) for the government to produce an incarcerated witness whom she identified as a "New Afrikan prisoner of war," and conducted direct examination—albeit brief—of that witness. Clark's lengthy closing statement explained to the jurors that she was "struggling to bring to light a radically different p[er]spective on the facts and fictions" presented at trial. While noting that "[p]erhaps it will not change your minds," Clark said that "[o]ne way that it was apparent was by our absence because we did not want to lend credence to this ritual." Thus Clark

openly conceded that her absence was a tactic to influence the jury in her favor.

In conclusion, we hold that Clark's Sixth Amendment claims fail on the merits. She complains that the judge conducted the trial in a manner that violated her constitutional rights. It was, however, her choice to conduct her trial in that manner, and she made the choice in part to achieve what she perceived as tactical advantages, rejecting the trial judge's warnings of the risks involved. If she faced trial without advantages guaranteed by the Sixth Amendment, that was not by the trial judge's imposition, but by her own informed choice, which the trial judge was bound to respect. Her claim of violation of her constitutional rights has no merit whatsoever.

CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED.

APPENDIX B

District Court Decision Granting Habeas Relief

United States District Court,
S.D. New York.
Judith CLARK, Petitioner,
v.
Ada PEREZ, Superintendent Bedford Hills and
Eliot Spitzer, Attorney General,
State of New York, Respondents.

Sept. 21, 2006.

Leon Friedman, Sharon Grobman, New York, NY, Lawrence Lederman, Michael L. Hirschfeld, Milbank, Tweed, Hadley & McCloy LLP, New York, NY, for Petitioner.

Eliot Spitzer, Attorney General for the State of New York, New York, NY, Michael E. Bongiorno, District Attorney of Rockland County, New City, NY, for Respondents.

OPINION AND ORDER

SCHEINDLIN, District Judge.

[W]here denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record.

-- *Avery v. State of Alabama,* 308 U.S. 444, 447, 60 S.Ct. 321, 84 L.Ed. 377 (1940).
The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'
-- *Johnson v. Zerbst,* 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

I. INTRODUCTION

Judith Clark seeks a writ of habeas corpus pursuant to section 2254 of Title 28 of the United States Code, challenging her state court convictions for three counts of Murder in the Second Degree, [FN1] six counts of Robbery in the First Degree, [FN2] and related lesser crimes. Clark is currently serving three consecutive indeterminate terms of imprisonment of twenty-five years to life on the murder charges, running concurrent to lesser terms on the robbery charges.

FN1. *See* N.Y. Penal Law § 125.25(1).

FN2. *See id.* § 160.15(4).

Clark asserts that the court's failure to insure that she was represented at trial amounted to a Sixth Amendment violation, and for the reasons fully discussed below I agree. Clark's situation is almost unprecedented--she vigorously sought to represent herself at trial, and yet was so unwilling to abide by courtroom protocol that she remained in a cell, outside the

courtroom, for the entire presentation of the prosecution's case. [FN3] Because Clark was never appointed standby counsel, there was *no one* in the courtroom to represent her interests during this critical phase of the trial.

FN3. As described in detail below, Clark was able to hear the proceedings through a one-way speaker in the holding cell, and would have been permitted to return to the courtroom upon her request.

This case is not about waiving the right to counsel
-- Clark did knowingly and intelligently waive this right. But "there are limits to waiver ... some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." [FN4] In the context of the Sixth Amendment right to counsel, a knowing waiver does not end the inquiry because a court must next determine that a defendant is "able *and willing* to abide by rules of procedure and courtroom protocol" in order for pro se status to be properly granted. [FN5] Indeed, even where self-representation is properly allowed, a court must terminate pro se status if a defendant subsequently demonstrates that she is unwilling to meet these requirements. Whether pro se status is deemed impermissible at the outset of or during a criminal trial, counsel must be appointed so that a defendant is not left without any representation at all. This rule derives not only

from a defendant's Sixth Amendment right but from the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." [FN6]

FN4. *United States v. Josefik,* 753 F.2d 585, 588 (7th Cir.1985) (cited in *United States v. Mezzanatto,* 513 U.S. 196, 204, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995)).

FN5. *McKaskle v. Wiggins,* 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (emphasis added).

FN6. *Wheat v. United States,* 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

II. BACKGROUND [FN7]

FN7. The following facts are drawn from the parties' submissions and are undisputed unless otherwise noted.

A. The Offense Conduct

Judith Clark is a former radical and member of the "Weather Underground" who, with four other individuals, was charged with participating in a 1981 Brinks armored truck robbery in Nyack, New York. A Brinks guard named Peter Paige and two policemen, Officer Waverly Brown and Sergeant Edward O'Grady,

were killed during the robbery, and other persons were injured by gunfire. Clark was the driver of a getaway vehicle. [FN8]

FN8. Clark was not accused of being one of the shooters. *See People v. Brown,* 136 A.D.2d 1, 525 N.Y.S.2d 618, 620 (2d Dep't 1988) (the shooters were "as many as six armed men").

B. Pretrial Proceedings

By Rockland County Indictment Number 81-825, Clark and four others were charged with three counts of second degree murder, six counts of first degree robbery, and several lesser counts of assault and larceny. In November, 1982, a motion for a change of venue filed by one of Clark's co-defendants was granted, and the entire case was removed to Orange County. [FN9] During the arraignment and initial pretrial proceedings, Clark was represented by Susan Tipograph. Clark and her co-defendants David Gilbert and Kuwassi Balagoon then applied to forego representation by counsel and proceed pro se.

FN9. *See People v. Boudin,* 90 A.D.2d 253, 457 N.Y.S.2d 302, 307 (2d Dep't 1982).

During pretrial proceedings on June 2, 1983, when Orange County Court Justice David S. Ritter was to rule on this application, the three defendants refused to be seated because they claimed "[t]he issue prior to that is [that]

the police in this courthouse beat people up." [FN10] Specifically, defendants alleged that a man "was singled out as a Black activist and the goons went and clubbed him for sitting down." [FN11] Defendants continuously interrupted and defied Justice Ritter, and eventually he asked to have Gilbert removed. Clark said: "We will go ourselves ... We will not proceed under these conditions ... This is a freedom fight. We are freedom fighters." [FN12] Tipograph and the other counsel also "rose and walked out and left the courtroom without [the court's] permission." [FN13] Justice Ritter commented: "I have not excused them and their attendance is required since they are lawyers in the case who have not yet been released." [FN14] He also noted for the record:

FN10. 6/2/83 Transcript of Pretrial Proceedings ("6/2/83 Tr."), Ex. C to Affirmation of Ann C. Sullivan, Counsel to Respondents, in Opposition to Motion to Vacate Pursuant to CPL § 440.10 ("Sullivan Aff."), Ex. D to 5/7/06 Opposing Declaration, at 4.

FN11. *Id.* at 8.

FN12. *Id.* at 9.

FN13. *Id.* at 10-11.

FN14. *Id.* at 11.

My efforts to conduct the questioning

> required by law of a defendant so that he can make a determination as to whether the waiver of counsel proposed is a knowing and intelligent waiver conducted and sought in recognition of the dangers that attend pro se representation have been frustrated by the refusal of the defendants to conform to the most rudimentary rules of order so that I could elicit the information required in order to make a ruling. [FN15]

FN15. *Id.*

When proceedings resumed that afternoon, the court noted Tipograph's continued failure to return to the courtroom. [FN16] Then, the three defendants returned to the courtroom voluntarily some minutes later, and Justice Ritter warned them: "If you are to remain in this courtroom, you will do so only if you agree that you will conduct yourself in a nondisruptive fashion in conformity with basic rules of decorum that apply in this courtroom." [FN17] Clark contested that she had been disruptive and asserted: "My purpose to be here at all was to fight for my right to represent myself because I am a freedom fighter ... because I am the only one who can speak for myself and I have things to say for myself." [FN18]

FN16. *See id.* at 13-14, 23-24.

FN17. *Id.* at 26.

FN18. *Id.*

Addressing Balagoon first, but directing his instruction to Clark and Gilbert as well, Justice Ritter stated:

> Now, you appear before me today because you seek to represent yourself in this case and the law requires that before I rule, that I must first determine whether your request is unequivocal and whether your offer to give up your right to be represented by a lawyer is knowingly and intelligently made. If you satisfy both of those conditions, I will permit you to represent yourself. My decision will be made after I ask you a series of questions and will rely on the answers that you give in deciding whether your request to represent yourself is a knowing, intelligent and unequivocal choice. If anyone says anything in the course of this proceeding that you don't understand, call that fact to my attention and I will not go on until you understand exactly what is happening. [FN19]

FN19. *Id.* at 32-33.

After ascertaining Balagoon's capacity to

proceed pro se, the court addressed the legal right of a person to defend himself:

> The law recognizes the right of a person to defend himself, but the law also recognizes that such a choice may not be a wise one. Let me alert you to some of the dangers of self-representation so that you will be aware of those dangers before you finally decide whether you wish to give up your right to be represented by a lawyer.
>
> Even the intelligent and educated layman has small and sometimes no skill in the science of law. Left without the assistance of counsel, he may be put on trial without a proper charge and convicted upon incomplete, irrelevant, or inadmissible evidence. Often the layman lacks the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. Most layman require the guiding hand of counsel at every step in the proceedings against them. The right to be heard would be in many cases of little avail if it did not include the right to be heard by counsel. Without counsel, though an accused be not guilty, he faces the danger of conviction because he does not know how to protect his rights.
>
> Lawyers generally, as I am sure you

know, are both college and law school trained before they are permitted to take the bar examination. Only those who pass the exam are licensed to practice law and the number who become trial lawyers is small. In order to adequately represent a client, a trial lawyer needs a comprehensive knowledge of the rules of evidence as well as an understanding of the art of jury selection and the art of cross-examination. Most non-lawyers do not have such education or training.

In view of the length and complexity of this case, sir, I consider it unwise for any defendant to represent himself. Despite this, I am required to permit you to represent yourself, if your choice is a knowing and intelligent one, made with awareness of the dangers of waiving counsel.

You should also be aware of the fact that if you are permitted to represent yourself, you will not receive any special favors. Rather, you will be subject to the same rules as a lawyer. Special rules are not made for those who choose to represent yourself nor can the judge become a legal advisor to the self-represented defendant. The judge's role is to remain neutral and detached.

> You should also be aware that self-representation is not a license to abuse the dignity and decorum of the courtroom. The person who represents himself must conduct himself as with any lawyer in the case. If a defendant conducts himself in such a way that the fair and orderly presentation of the issues during the trial is prevented or the progress of the trial is undermined, upset or unreasonably delayed, then the court may remove the defendant from the courtroom. If that occurs, do you understand that during the period of such removal the defendant who is representing himself will not be represented by anyone, thus, he has waived both the right to be present at his trial and the right to represent himself or be represented by counsel[?] Do you understand the significance of what I've just said? [FN20]

FN20. *Id.* at 40-42.

As the court turned to address Clark, Clark advised Justice Ritter that she had "absolutely" heard and understood what had been said. [FN21] Clark confirmed that she suffered from no physical or mental impairments to prevent her from understanding the proceedings. [FN22] She told the court she had sufficient time to reflect on her decision to proceed pro se: "I stated my demand to be able

to represent myself and in fact fired my lawyer on September 13th of last year and I have fought to represent myself as a freedom fighter ever since. That is plenty of sufficient time." [FN23]

FN21. *Id.* at 58.

FN22. *See id.*

FN23. *Id.*

Clark informed the court that she "went through her first year of college and then [she] was expelled for demonstrations." [FN24] Subsequently, she worked at assorted jobs, including at the pre-sentence division of the Legal Aid Society, where she worked "in the courts and social agencies." [FN25] Clark also said:

FN24. *Id.* at 59.

FN25. *Id.* at 60.

> I have been involved with the question of the courts and the questions of legality rather intimately, not so much as a paid worker, but I have been involved in support of political prisoners and prisoners of war ... the main thing that I could say from that experience is learning that this court system and the trappings of legality that it has created

> around the court system are a cover for being part of the maintenance of this system and being part of protecting property and those who own and control that property ... and I think that my years and years of experience with the courts is part of what helped me understand why the only solution was revolution. [FN26]

FN26. *Id.* at 61-62.

Clark confirmed she was "not at all" dissatisfied with the services of Tipograph, but nonetheless chose to proceed by self-representation: "I wish to represent myself because as a freedom fighter I am the only one who can speak for myself and I can definitely not be represented by an officer of the court." [FN27] When the court questioned Tipograph about whether Clark was "capable of representing herself and whether she was competent to make this very serious decision," Tipograph stated that she had "absolutely no question about her competency and intelligence to make this decision." [FN28]

FN27. *Id.* at 65.

FN28. *Id.*

Justice Ritter concluded the inquiry by repeating a warning for the third time that afternoon: "You are aware that if I grant your

application and I am disposed to do so, that if there comes a time where I am required as I see fit by reason of your conduct to remove you from the courtroom, you will at that juncture be unrepresented. Are you aware of the significance?" [FN29] Clark stated "I am perfectly aware and I would like to make clear that I left voluntarily this morning ... because it would have been an abrogation of our principles to continue as though everything was just alright." [FN30]

FN29. *Id.* at 65-66.

FN30. *Id.* at 66.

The court concluded by addressing the portion of Clark's application that requested permission for her attorney, Susan Tipograph, to remain as her "legal advisor," making Tipograph available for consultation but not to appear and speak on Clark's behalf. Justice Ritter noted that Tipograph would be involved in the ongoing federal prosecution that would last for "some months to come." [FN31] He told Clark: "My intention is to commence trial of this case on July the 11th. I alert you before you finally take a position that in my judgment there is no warrant ... to delay the commencement of the state prosecution to await the availability of Miss Tipograph to serve in the capacity of your legal advisor, whatever that means." [FN32] Justice Ritter concluded, "Being aware of that, do you nevertheless wish

to press your application to proceed pro se?" [FN33] Clark answered: "Absolutely." [FN34] At this juncture, the court granted Clark's request to proceed by self-representation. [FN35] Later on the same day, Clark said:

FN31. *Id.*

FN32. *Id.* at 66-67.

FN33. *Id.* at 67.

FN34. *Id.*

FN35. *See id.*

> I have one other issue ... which is just perhaps you will say it is a question that has to be addressed about how we deal with the trial. I just want to make my position clear ... We consider ourselves freedom fighters, and we do not believe that the question at hand in this situation has anything to do with guilt or innocence or the question of criminal acts, but has to do with the underlying issues of the struggle, a just struggle for national liberation by New Afrikan forces and New Afrikan people, and the responsibility of white anti-imperialists to give support to that at every level. [FN36]

FN36. *Id.* at 74.

During court proceedings on June 30, Justice Ritter mentioned that he had received a letter from Tipograph, who confirmed that she would serve as Clark's legal advisor. [FN37] Judith Holmes, who appeared as Balagoon's legal advisor, also stated that the court "certainly referred to us as legal advisors and has in my understanding treated us in all ways as legal advisors." [FN38] Justice Ritter emphasized that they had not been appointed as attorneys and were thus not entitled to any compensation, but that they were permitted to "confer. I will permit you to do that. I will permit you to be inside the rail. You have whatever privileges the jail officials give you, and I told them to recognize your status as legal advisors. They are doing that now." [FN39] The court also noted that, according to the letters submitted by the legal advisors, "there is no conflict of interest in joint meetings between Mr. Balagoon, Miss Clark, Mr. Gilbert and Miss Boudin [FN40] ... [or] in meeting with a list of legal advisors and legal assistants" and that Clark had signed a document dated June 27, waiving any conflict of interest. [FN41]

FN37. *See* 6/30/83 Transcript of Pretrial Proceedings ("6/30/83 Tr."), Ex. D to Sullivan Aff., at 43.

FN38. *Id.*

FN39. *Id.* at 44.

FN40. Justice Ritter referred to another co-defendant, Katherine Boudin, who later pleaded guilty to one charge of second degree murder and was sentenced to twenty years to life and was paroled in September, 2003. *See* Memorandum of Law in Support of Habeas Corpus Petition ("Pet.Mem.") at 2 n. 1.

FN41. *See* 6/30/83 Tr. at 44-45.

Jury selection commenced on July 20. At the beginning of the day, Clark complained that she, Balagoon and Gilbert had been unsuccessful in holding legal meetings in the jail at the conclusion of the proceedings each day. Justice Ritter did "not want to take the time on this issue to have [Clark] make a statement" because potential jurors were waiting, but he encouraged her to submit all complaints in writing. [FN42] Clark submitted something in writing but protested her inability to make an immediate oral statement. She concluded by saying that she and her co-defendants would "not be able to be in Court tomorrow functioning unless we have a legal meeting today and unless we are assured that we can have them ... We will not be here unless that process changes." [FN43] Justice Ritter replied that Clark had an "absolute right under the Constitution and statutes to be physically present during all of the proceedings ... [but that] the law permits you to give up or waive that right." [FN44] The court advised the

defendants: "If you choose not to come to Court tomorrow, that is a choice that you may make, provided that I am satisfied that it is a knowing and intelligent choice." [FN45]

FN42. 7/20/83 Transcript of Pretrial Proceedings, Ex. G to Sullivan Aff., at 680.

FN43. *Id.* at 683.

FN44. *Id.*

FN45. *Id.*

Before continued jury selection on July 21, Justice Ritter noted the absences of defendants, who had "refused to come up to the courtroom." [FN46] Defendants were in holding cells and could hear the courtroom proceedings through speakers. Justice Ritter said that the defendants would be permitted to come back up if they chose, and that they would otherwise have limited opportunity to communicate with Justice Ritter by means of a microphone that would transmit sound from the cell area back up to the courtroom. [FN47]

FN46. 7/21/83 Trial Transcript, Ex. H to Sullivan Aff., at 851.

FN47. *See id.*

Out of the presence of the jury panel, Justice Ritter addressed Clark's claim that the

defendants were not accorded sufficient opportunity to consult and confer to prepare their joint defense. [FN48] Keith McLean, the correctional administrator at the Orange County Jail, testified that Clark and her co-defendants did have several opportunities to meet together. [FN49] The court told McLean that it intended to provide defendants with the opportunity to confer privately for a minimum of two hours before and after the day's court session in the adjacent conference facility while the case was being tried. [FN50]

FN48. *See id.* at 852.

FN49. *See id.* at 856, 858-59.

FN50. *See id.* at 857.

Before jury selection resumed, Justice Ritter noted that the court received a telephone call from legal advisor Judith Holmes, who reported that Clark and her co-defendants elected not to attend court proceedings that day because they had been denied their request to conduct a legal meeting the night before. [FN51] Justice Ritter told the defendants via microphone that they were making "an error" but they had an "absolute right to be present and to participate in the proceedings within the framework of established rules," and the court would "not force them to be physically present during this stage of the proceedings since they have voluntarily elected not to appear." [FN52]

He noted that during jury selection the day before, none of the three had exercised any challenges, and that they consistently took no position with respect to the prosecutor's challenges to prospective jurors. [FN53] Justice Ritter advised the co-defendants that when they wished, they would be brought up to participate in the trial proceedings. [FN54] Finally, he denied Clark's request to participate in the trial proceedings via microphone from her holding cell, and limited its use to alerting the court of their desire to return to the courtroom. [FN55]

FN51. *See id.* at 860-61.

FN52. *Id.*

FN53. *See id.* at 862.

FN54. *See id.* at 862-63.

FN55. *See id.* at 865.

Several minutes later, the co-defendants returned to the courtroom. [FN56] Gilbert explained, "Judge Ritter, you and Mr. McLean made a record on this issue about our right to legal meetings. We objected to any proceedings going forward without us having a chance to answer that record. It's clearly an attempt to muzzle us." [FN57] Mentioning the waiting jury panel, Justice Ritter denied defendants' request and advised them that they would have an opportunity later in the proceedings to make

a record. [FN58] Gilbert responded, "You talk about the delay. If you were concerned about that, all you had to do was to allow us to have a legal meeting last night and this whole mess would have been avoided. You want to get us out of the courtroom. That's your purpose." [FN59] Justice Ritter ruled that the defendants could not make a statement on the record. Clark stated: "You created a charade in this courtroom now," and the Judge Ritter said, "Alright. The Defendants are removed." [FN60]

FN56. *See id.* at 869.

FN57. *Id.* at 870.

FN58. *See id.* at 869-71.

FN59. *Id.* at 870.

FN60. *Id.* at 871.

Before voir dire continued on July 25, Balagoon complained on behalf of all three defendants that the arrangements made for them to meet in the conference room were not adequate, although he stated that the defendants had in fact conducted legal meetings on the days requested since the last court session. [FN61] Justice Ritter also entered in the court record documents provided by McLean recording the number of legal visits shared with the defendants and the number of telephone calls placed and received by the defendants

listed as "legal calls." [FN62] Finally, legal advisor Judith Holmes sought to make a record on defendants' behalf about the legal meetings. Justice Ritter gave the following description of her role:

FN61. *See* 7/25/83 Transcript of Pretrial Proceedings, Ex. I to Sullivan Aff., at 1010.

FN62. *See id.* at 1018.

> Miss Holmes, please listen to me. You are here as legal advisor to the defendants. You are not here as the spokesperson for the defendants. That's subject that I examined each of them about at some length, and they were all very clear in saying that they wished to speak for themselves. If you want to consult with your clients, you may do so. If you want to give them advice on what they should say, you are free to do that as well. You are not here as a spokesperson. Resume your seat. [FN63]

FN63. *Id.* at 1018-19.

On July 26, before jury selection continued, Clark, Balagoon and Gilbert advised the court they no longer wished to remain in the courtroom. [FN64] The following colloquy took place between Justice Ritter and Clark:

FN64. *See* 7/26/83 Transcript of Pretrial Proceedings, Ex. J to Sullivan Aff., at 1245-48.

> MS. CLARK: ... For us to continue voir dire and give any legitimacy to the picking of a jury whose function is illegitimate and whose fascist implications are made more extreme by its anonymous nature would undermine our basic principles. I join in saying I do not wish to be here anymore. And with regards to your question, do I wish to be held downstairs, no, I don't wish to be held downstairs, but I am dragged downstairs in chains when I make my wish not to be downstairs, so I have no choice but to be downstairs.
>
> THE COURT: I will permit the defendants, at their request, to withdraw from the courtroom. They are to be held in the downstairs holding area. We will activate the microphone system. You may return when you wish to do so, provided you are willing to abide by the rules that apply to courtroom conduct. We will take a brief recess. [FN65]

FN65. *Id.* at 1248.

Defendants were again removed to the holding cell with the microphone and sound system activated, and Justice Ritter stated that they could return to the courtroom when they

wished. [FN66] Before resuming jury selection, Justice Ritter noted that the defendants had conferred with Holmes for one hour after proceedings concluded the day before, and again on that morning, and that Holmes was physically present in the courtroom that morning. [FN67]

FN66. *See id.* at 1248-50.

FN67. *See id.* at 1249.

None of the defendants returned to the courtroom for the continuation of voir dire on July 27 and 28, and August 1, 2, 3, and 4. [FN68] Their legal advisors were also absent. [FN69] Prior to commencement of each day's proceedings, the court noted their voluntary absence and the fact that the sound system transmitting the proceedings to their holding cells was activated and operating. [FN70] On August 8, during the final stage of jury selection, defendants appeared in court and stated that they did not wish to exercise any peremptory or cause challenges to the panel. [FN71]

FN68. *See* Transcript Excerpts, Ex. K to Sullivan Aff.

FN69. *See id.*

FN70. *See id.*

FN71. *See* 8/8/83 Trial Transcript, Ex. L to Sullivan Aff., at 2786- 88.

C. Petitioner's Trial

On August 8, 1983, the court completed jury selection. That afternoon, after the court delivered preliminary instructions to the impaneled jury, Clark and her co-defendants were to begin opening statements. Legal advisor Holmes was present in the courtroom. [FN72]

FN72. *See id.* at 2853.

Balagoon began his opening remarks by discussing the historical origin of his birth name, the political history of the New Afrikan people, his involvement with assorted radical groups in acts of civil disobedience, and views about fascism in American government. [FN73] After the prosecutor objected twice, and the court asked Balagoon to direct his remarks to the proof that would be offered at trial, Balagoon reiterated that he did not recognize the authority of the court, and insisted that his opening remarks were intended to explain his position. [FN74] Balagoon stated that "if that ... can't be done, I would rather not be dealing with this Court at all, but I didn't ask for this charade." [FN75] Justice Ritter told Balagoon: "If you wish to tell us what you intend to prove, I will permit you to do so. If you are going to continue in the vein that you have been, then

you are directed to cease that." [FN76] At that point Mr. Balagoon announced: "In that case, I am leaving." [FN77] The following conversation ensued:

FN73. *See id.* at 2853-71.

FN74. *See id.* at 2871.

FN75. *Id.*

FN76. *Id.* at 2872.

FN77. *Id.* at 2873.

> MS. CLARK: We are not going to continue when you throw Mr. Balagoon out.
>
> THE COURT: By "we are not going to continue," do you mean that you wish to withdraw from the courtroom, is that what I am to understand? You are apparently packing up.
>
> MS. CLARK: Number one, I am an anti-imperialist freedom fighter. I don't recognize the legitimacy of this Court. Second of all, I am not going to continue here just as though everything was just proper when what's obvious is obvious, which is, that the truth about the question of New Afrika is not allowed to be spoken in this courtroom. [FN78]

FN78. *Id.*

Out of the presence of the jury, the court addressed the defendants as follows:

> [Y]ou have made it clear that you wish to withdraw. I will permit you to do so. As I have said at an earlier stage ... I don't consider it to be in your best interest to do so. You may be a full participant in this trial within the framework of what is legally permitted. If you withdraw, that's a choice that you may make. I will permit you to withdraw under the same circumstances as earlier in the case and if at any stage you wish to return and participate within the framework of the rules, that apply to a case of this sort, I will permit you to do that as well ... communicate your wish to the officials who are in the holding area. [FN79]

FN79. *Id.* at 2874-75.

After Gilbert confirmed, that he, too, wished to leave the proceedings and return to the holding cells, the court again addressed defendants:

> THE COURT: Do you understand, sir, that if you leave the courtroom, and I say this to all three of you, that during

> that period that you are absent the case will continue, it will go on. You will not be able to participate in those steps at trial, namely the presentation of a proper opening statement within the boundaries of what is permissible. You will not be able to participate in the examination and cross examination of witnesses in raising objections while you are out of the courtroom, and in doing any of the things that a person accused of crime is permitted to do. If you make such a choice, I repeat, I think [it's] short-sighted, but it is a choice that you may make if that's what you wish to do. Miss Clark, you wish to withdraw as well, is that correct?
>
> MS. CLARK: Yes.
>
> THE COURT: All right. All of you may withdraw. You know how to come back and under what conditions if you wish. Court stands in temporary recess.
>
> MS. CLARK: You say we may withdraw. It should be obvious that we have been forced into this court. We don't accept its legitimacy. [FN80]

FN80. *Id.* at 2875-76.

When the jury returned to the courtroom, the court noted the absence of Clark, Balagoon

and Gilbert, informed the jury that defendants had elected to "voluntarily absent themselves" from the proceedings, that it was their right to do so, and that they could hear the proceedings through the "microphone system that you see." [FN81]

FN81. *Id.* at 2879.

The prosecutor made an opening statement, and commenced his direct case. [FN82] During the next five days of the prosecution's case, on August 9, 11, 15, 16, and 17, defendants did not participate in the trial proceedings. [FN83] Their legal advisors were not present in the courtroom. [FN84] On each of those days, the court noted for the record their voluntary absence from the proceedings, their right to return when they wished, and the activation of the microphone system. [FN85]

FN82. *See id.* at 2876.

FN83. *See* Transcript Excerpts, Exs. M and N to Sullivan Aff.

FN84. *See id.*

FN85. *See id.*

On August 22, Clark, Balagoon and Gilbert, together with Holmes, were present at the court proceedings. [FN86] Out of the presence of the jury, the defendants filed a

motion for removal of the case "to a friendly country," as well as requests for production as defense witnesses three "New Afrikan prisoners of war" incarcerated in California, Illinois and Manhattan. [FN87] Noting that the prosecution would complete its direct case that very day, the court asked defendants to explain the delay in seeking to produce witnesses, but defendants only stated that they would speak to the "struggle [the Black Liberation Army] ha[s] been waging against the state." [FN88] Justice Ritter advised Clark and her co-defendants that he would consider their application and make a ruling later that day. [FN89] The defendants returned to their holding cells and did not participate in further proceedings.

FN86. *See* 8/22/83 Trial Transcript, Ex. O to Sullivan Aff., at 3826.

FN87. *Id.* at 3826-30.

FN88. *Id.* at 3835-39.

FN89. *See id.* at 3832.

On August 29, Clark, Balagoon, and Gilbert appeared in court with their legal advisor Holmes. [FN90] Out of the presence of the jury, defendants filed a motion seeking to be accorded "prisoner of war status" because their criminal prosecution was "an international dispute" related to "the wars of liberation." [FN91] Before ruling on the motion, the court

noted its August 24 written decision granting the application to produce Nathaniel Burns, a/k/a Sekou Odinga, to permit defendants to call him as a witness at trial, and otherwise denying the application to produce the other two inmates from Illinois and California. [FN92] The court also confirmed defendants' August 25 communication that they did not seek to call additional defense witnesses. [FN93] The court adjourned the proceedings pending the production of Odinga from federal custody. [FN94]

FN90. *See* 8/29/83 Trial Transcript, Ex. P to Sullivan Aff., at 3923.

FN91. *Id.* at 3923-25.

FN92. *See id.* at 3925-26.

FN93. *See id.* at 3926.

FN94. *See id.* at 3927-30.

Nearly two weeks later, on September 12, trial proceedings resumed, and Sekou Odinga testified as part of the defense case. [FN95] Legal advisors Holmes and Tipograph were present in the courtroom. [FN96] Although Clark and Gilbert confirmed their understanding that they had the right to examine Odinga, Balagoon conducted the direct examination on their behalf, asking him to describe the tenets of the New Afrikan political

movement and the Black Liberation Army. [FN97] Clark asked Odinga only one question, about the responsibilities of white people "in relationship to the struggle that you have spoken to quite fully today." [FN98] At the conclusion of Odinga's testimony, defendants rested their case. [FN99]

FN95. *See* 9/12/83 Trial Transcript, Ex. Q to Sullivan Aff.

FN96. *See id.*

FN97. *See id.* at 3943, 3948, 3949-69.

FN98. *Id.* at 3968.

FN99. *See id.* at 3983.

Defendants did not submit requests to charge the jury. Gilbert explained on their behalf: "We consider these proceedings illegitimate. We have no interest about getting into arguments with you about how you charge the jury, as you would do in your own purposes in any case." [FN100]

FN100. *Id.* at 3985.

On September 13, Clark and her co-defendants delivered separate closing arguments to the jury. Clark's summation focused almost exclusively on her political ideology. She reiterated that she viewed the

Court as "a tool of imperialist rule ... not here to protect the interests of working people, but to protect the property rights in control by the rich and to repress oppressed peoples and dissidents when they rise up." [FN101] Clark told the jury: "The D.A. and Judge say this is a criminal case. We say the crime involved is by the U.S. Government in denying black people their human rights and self-determination." [FN102] The only argument she made related to the evidence at trial was:

FN101. 9/13/83 Trial Transcript, Ex. R to Sullivan Aff., at 4001.

FN102. *Id.* at 4001-02.

> During this trial you saw and heard several witnesses who were from the FBI. They were clean scrubbed, soft spoken, and polite. They testified about all sorts of scientific tests they did in their laboratories in Washington. But they failed to explain why their compatriots tortured Sekou Odinga after his capture, or why they tortured Puerto Rican freedom fighter William Morales in Mexico. [FN103]

FN103. *Id.* at 4003.

She ended her summation by recognizing that "[s]oon this charade they call a trial will be done" and by invoking her long term goal: "[a]

society where the only privileged people will be the children whose potential and creativity make all our sacrifices worthwhile." [FN104] When Justice Ritter charged the jury on September 14, defendants remained in their holding cells, and none of the defendants' legal advisors were present in the courtroom. [FN105] Some time later, the jury returned a guilty verdict as to all defendants.

FN104. *Id.* at 4008.

FN105. *See* 9/14/83 Trial Transcript, Ex. S to Sullivan Aff., at 4115.

At sentencing proceedings on October 6, 1983, in the presence of legal advisors Tipograph, Holmes, and Lynne Stewart, Clark restated her commitment to their revolutionary, anti-imperialist cause for freedom and national liberation for New Afrikans and reiterated her contempt for the court's authority. [FN106] Shortly before Justice Ritter imposed sentence, defendants voluntarily absented themselves from the proceedings and the court activated the sound system. [FN107] After the court imposed sentence, the clerk of the court was instructed to advise Clark, Balagoon and Gilbert orally and in writing of their right to appeal from the judgment of conviction. [FN108]

FN106. *See* 10/6/83 Transcript of Sentencing Proceedings, Ex. T to Sullivan Aff., at 21-30.

FN107. *See id.* at 39.

FN108. *See id.* at 47-48.

D. Petitioner's Motion to Vacate the Judgment of Conviction Pursuant to New York Criminal Procedure Law Section 440.10

On December 12, 2002, Clark filed a motion to set aside her conviction under section 440.10. The motion included an affidavit from Clark that detailed her regret for her actions, her rejection of her past life and the reasons for her delay in pursuing any legal remedy. It also contained psychologists' statements supporting the argument that Clark was not capable of taking any steps to appeal her case until many years had passed.

Clark raised three substantive arguments in support of her motion. *First,* she argued that she should not have been allowed to appear pro se, given the indications that she would act in a disruptive manner necessitating her removal from the court. *Second,* Clark asserted that even if a criminal defendant is permitted to appear pro se, a court must appoint stand-by counsel if there is a suggestion that the individual will act in a disruptive manner resulting in removal from the courtroom. *Third,* Clark argued that notwithstanding the particular developments of any criminal trial, a court should never permit a trial to continue with no one in the courtroom to protect the

defendant's interests.

Clark also made various arguments about why a motion under section 440.10 was permissible despite the long period of time that had elapsed since her conviction and sentencing. She cited *People v. Jackson,* in which the New York Court of Appeals decided that a motion under section 440.10 could potentially be filed "decades after direct appeal has been completed." [FN109] Clark noted that state courts have also held that the time limit that is specified in 440.10, which requires motions to be made in accordance with the normal appeal schedule, does not apply to motions based upon deprivation of the right to counsel. [FN110] In addition, Clark cited *People v. Silverman,* [FN111] arguing that under the writ of coram nobis, claims asserting deprivation of the right to counsel were still available even if an appeal had not been taken and even if the error appeared on the face of the record.

FN109. 78 N.Y.2d 638, 645, 578 N.Y.S.2d 483, 585 N.E.2d 795 (1991).

FN110. *See, e.g., People v. Harris,* 109 A.D.2d 351, 491 N.Y.S.2d 678, 687 (2d Dep't 1985) ("That provision of the statute [section 440.10(3)(a)] specifically provides that '[t]his paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial.' ").

FN111. 3 N.Y.2d 200, 165 N.Y.S.2d 11, 144 N.E.2d 10 (1957).

The Rockland County Court denied Clark's motion. The court upheld Justice Ritter's decision to allow Clark to appear pro se, holding that he had conducted a perfectly thorough inquiry, and that Clark's answers indicate competence to make the choice. The court found "the fact that her decision to waive her right to be present throughout her trial was voluntary" was "unassailable." [FN112] The court also stated that the appointment of a legal advisor was a sufficient protection of Clark's right to counsel, reasoning that "[a]lthough defendant did not have a constitutional right to proceed pro se and at the same time be represented by counsel, the trial court, in an exercise of caution and of discretion, permitted defendant to have legal advisors with whom she could consult." [FN113] This brief section of the opinion concluded: "All this is to convey that *were the court to consider* defendant's claim of a deprivation of her constitutional right, it would find the claim completely meritless." [FN114] This statement is clearly dicta.

FN112. *People of the State of N.Y. v. Judith Clark,* Ind. Nos. 81-285 & 82-6 (Sup.Ct. Rockland Co. Sept. 19, 2003) ("2003 Decision"), App. B to Pet. Mem., at 6.

FN113. *Id.* at 6-7 (citation omitted).

FN114. *Id.* at 7 (emphasis added).

The court then *held* that the claim could not be brought because it was procedurally defaulted:

> [The New York Criminal Procedure Law (CPL)] § 440.10(2)(c) mandates denial of a motion to vacate when 'sufficient facts appear on the record' to permit an appellate court adequate review of the issue raised on appeal, or when such facts appear on the record, and a defendant unjustifiably fails to take an appeal or to raise such claim in an appeal actually perfected. The record herein is more than adequate to have permitted an appellate court to consider the claims raised. Nevertheless, defendant did not appeal, and now, twenty years later, she asks this court to consider these claims. [FN115]

FN115. *Id.*

The court rejected petitioner's reliance upon *People v. Silverman,* noting that the case was decided in 1957, before the effective date of the Criminal Procedure Law, which was September 1, 1971. [FN116] It also rejected other cases upon which petitioner relied, viewing them as distinguishable because they dealt with claims of ineffective assistance of

counsel. [FN117]

FN116. *See id.* at 7-8.

FN117. *See id.* at 8.

Finally, the court rejected Clark's explanation of the reasons justifying her delay in seeking a review of her trial and conviction.

> [D]efendant attempts to 'justify' her delay in bringing the present motion by arguing, in essence, that she was brainwashed (the court's terminology, not hers) by the members of her 'revolutionary' group into defying the entire legal system during her trial and maintained this 'revolutionary' identity until she underwent a 'transformation' in therapy and recognized the foolishness of her youth. In her fifty-four page affidavit she also outlines her good works in prison and her present remorse for her participation in the crimes of which she was convicted. [FN118]

FN118. *Id.* at 9.

The Court concluded that "[p]eer pressure followed by an alleged psychological transformation does not provide a legal ground upon which defendant can rely to justify her failure to present her present claims on an

appeal, in order to meet the procedural requirements of CPL § 440.10(2)(c)." [FN119] The court held that Clark's motion was procedurally barred, finding it "unnecessary to reach the People's argument that the motion is barred by the common law doctrine of laches." [FN120]

FN119. *Id.*

FN120. *Id.* at 10.

Petitioner subsequently filed a motion for leave to appeal to the Appellate Division, Second Department. That motion was denied by order dated January 20, 2004, with service of notice on January 27. [FN121]

FN121. *See The People v. Judith Clark,* Ind. No. 81-00285 (2d Dep't Jan. 20, 2004), App. A to Pet. Mem.

III. LEGAL STANDARDS

A. Antiterrorism and Effective Death Penalty Act of 1996

This petition is governed by section 2254 of the United States Code as it was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). [FN122] The AEDPA provides that a federal court may entertain an application for a writ of habeas corpus from a state prisoner "only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States." [FN123] Section 2254 now provides:

FN122. *See generally Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

FN123. 28 U.S.C. § 2254(a).

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. [FN124]

FN124. *Id.* § 2254(d)(1).

1. Statute of Limitations

The AEDPA establishes a "1-year period of limitation" in connection with an application for a writ of habeas corpus "by a person in custody pursuant to the judgment of a State court."

[FN125] When considering such an application, a court must calculate the relevant limitation period from the latest of four benchmark dates. The relevant benchmark date for petitioner's claim is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." [FN126] A judgment becomes final when a petitioner fails to file a timely notice of appeal, and the appeal period expires. [FN127] Prisoners whose convictions became final prior to the AEDPA's effective date of April 24, 1996, had a one-year grace period in which to file their habeas corpus petitions, or until April 24, 1997. [FN128] The limitations period may be subject to equitable tolling, [FN129] but "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." [FN130]

FN125. *Id.* § 2244(d)(1).

FN126. *Id.* § 2244(d)(1)(A).

FN127. *See Bethea v. Girdich,* 293 F.3d 577, 578-79 (2d Cir.2002).

FN128. *See Ross v. Artuz,* 150 F.3d 97, 102-03 (2d Cir.1998).

FN129. *See Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)

("We have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations. Because respondent assumes that equitable tolling applies and because petitioner is not entitled to equitable tolling under any standard, we assume without deciding its application for purposes of this case.") (citation omitted).

FN130. *Id.* at 418, 125 S.Ct. 1807.

In the Supreme Court's recent decision in *Day v. McDonough,* the Court addressed the nature of the AEDPA statute of limitations, finding that it is not "jurisdictional." [FN131] The Court compared the statute of limitations to "other affirmative defenses to habeas petitions, notably exhaustion of state remedies, procedural default, and nonretroactivity," [FN132] and held that

FN131. *Day v. McDonough,* --- U.S.----, 126 S.Ct. 1675, 1681, 164 L.Ed.2d 376 (2006).

FN132. *Id.* at 1678.

> district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition. We so hold, noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners. We stress that a

> district court is not required to double-check the State's math. If, as this Court has held, '[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants,' then, by the same token, they surely have no obligation to assist attorneys representing the State. [FN133]

FN133. *Id.* at 1684 (quoting *Pliler v. Ford,* 542 U.S. 225, 231, 124 S.Ct. 2441, 159 L.Ed.2d 338 (2004)) (citations omitted).

The Court imposed several additional constraints on district courts before they may raise the statute of limitations issue sua sponte. *First,* a district court may not "override a State's deliberate waiver of a limitations defense." [FN134] *Second,* "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." [FN135] *Third,* "the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." [FN136]

FN134. *Id.* at 1679-80 (noting that in the instant case "the federal court confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time").

FN135. *Id.* at 1684.

FN136. *Id.* (quoting *Granberry v. Greer,* 481 U.S. 129, 136, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987)).

2. Standard of Review

The standard of review to be applied by a federal court to a state prisoner's habeas petition depends on whether the federal law claim was "adjudicated on the merits in State court proceedings." [FN137] The phrase "adjudicated on the merits" refers to a decision finally resolving the claim with res judicata effect, when the decision is based on the substance of the claim advanced, rather than on a procedural or other ground. [FN138] In order to determine whether the claim was decided based on the substance or another ground, Second Circuit courts consider: " '(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits.' " [FN139]

FN137. 28 U.S.C. § 2254(d).

FN138. *See Sellan v. Kuhlman,* 261 F.3d 303, 311 (2d Cir.2001).

FN139. *Cotto v. Herbert,* 331 F.3d 217, 230 (2d Cir.2003) (quoting *Aparicio v. Artuz,* 269 F.3d 78, 93 (2d Cir.2001)).

If a state court adjudicated a petitioner's federal law claim on the merits, the AEDPA permits a federal court to grant a writ of habeas corpus to a state prisoner only if the state court's denial of relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [FN140] The Supreme Court has explained that a state court decision is "contrary to" clearly established federal law if: (1) the state court reaches the wrong result when presented with facts that are "materially indistinguishable from a relevant Supreme Court precedent;" or (2) the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." [FN141] The "unreasonable application" prong permits a federal habeas court to grant the writ "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case." [FN142]

FN140. 28 U.S.C. § 2254(d)(1).

FN141. *Williams,* 529 U.S. at 405, 120 S.Ct. 1495.

FN142. *Wiggins v. Smith,* 539 U.S. 510, 520-21,

123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quotation marks and citations omitted).

However, if a state court did not adjudicate the federal claim on the merits, "AEDPA deference is not required" and conclusions of law and mixed findings of fact and conclusions of law are reviewed de novo. [FN143] The Second Circuit explained this result in *Washington v. Schriver:*

FN143. *DeBerry v. Portuondo,* 403 F.3d 57, 66-67 (2d Cir.2005), *cert. denied,* --- U.S. ----, 126 S.Ct. 225, 163 L.Ed.2d 189 (2005).

Assuming *arguendo* that the petitioner's due process claim was not adjudicated on the merits, we apply the pre-AEDPA standard of review which accords less deference to a state court's resolution of a federal constitutional issue. Prior to AEDPA, pure questions of law and mixed questions of law and fact were reviewed de novo. Under pre-AEDPA standards the factual findings of the state courts were 'presumed ... correct' absent special circumstances listed in the statute. The presumption applied to historical facts and inferences drawn from them, and to the factual findings of state appellate courts as well as trial courts. [FN144]

FN144. 255 F.3d 45, 55 (2d Cir.2001) (citations omitted).

3. Procedural Bar

A federal habeas court may not review a state prisoner's claims if the claims were defaulted in state court "pursuant to an independent and adequate state procedural rule ... unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." [FN145] "[C]ause," under this standard, "must be something external to the petitioner" and " 'ordinarily turn[s] on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.' " [FN146] To establish "prejudice," a "habeas petitioner must show 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." ' [FN147]

FN145. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

FN146. *Id.* at 753, 111 S.Ct. 2546 (quoting *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 263, 91 L.Ed.2d 3979 (1986)) (emphasis omitted).

FN147. *Murray,* 477 U.S. at 494, 106 S.Ct. 2639 (quoting *United States v. Frady,* 456 U.S. 152,

170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)) (emphasis omitted).

"[W]hen a state court uses language such as '[t]he defendant's remaining contentions are either unpreserved for appellate review *or* without merit,' the validity of the claim is preserved and is subject to federal review." [FN148] When a state court expressly holds a claim was "not preserved for appellate review" but holds in the alternative that the claim is meritless, a federal court is barred from reviewing the claim. [FN149] The Second Circuit has cautioned against requiring state courts to use "specific talismanic phrases" to deny a federal claim on state procedural grounds. [FN150] In every case, the question is whether " 'the last state court rendering a judgment in the case ... states that its judgment rests on a state procedural bar.' " [FN151]

FN148. *Fama v. Commissioner of Corr. Servs.,* 235 F.3d 804, 810 (2d Cir.2000) (emphasis added).

FN149. *See Glenn v. Bartlett,* 98 F.3d 721, 725 (2d Cir.1996).

FN150. *Id.*

FN151. *Id.* at 724 (quoting *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)).

"[T]he adequacy of state procedural bars to the assertion of federal questions ... is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.' " [FN152] The Second Circuit's decision in *Cotto v. Herbert* provided a roadmap for courts considering the adequacy of a state procedural default to preclude federal habeas review. [FN153] Courts must focus on "whether application of the procedural rule is 'firmly established and regularly followed' in the specific circumstances presented in the case, an inquiry that includes an evaluation of the asserted state interest in applying the procedural rule in such circumstances." [FN154] The Second Circuit used the following three considerations from the Supreme Court's *Lee v. Kemna* decision as "guideposts in 'evaluat[ing] the state interest in a procedural rule against the circumstances of a particular case:' " [FN155]

FN152. *Lee v. Kemna,* 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (quoting *Douglas v. Alabama,* 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)).

FN153. 331 F.3d 217 (2d Cir.2003).

FN154. *Id.* at 240 (quoting *Lee,* 534 U.S. at 376, 122 S.Ct. 877).

FN155. *Id.* (quoting *Lee,* 534 U.S. at 387-88, 122 S.Ct. 877). *Accord Monroe v. Kuhlman,* 433 F.3d

236, 245 (2d Cir.2006).

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court' decision; (2) whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had 'substantially complied' with the rule given 'the realities of trial,' and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest. [FN156]

FN156. *Cotto,* 331 F.3d at 240 (quoting *Lee,* 534 U.S. at 381-85, 122 S.Ct. 877).

The Second Circuit emphasized the Supreme Court's holding that "the adequacy of a state procedural bar is determined with reference to the 'particular application' of the rule; it is not enough that the rule 'generally serves a legitimate state interest.' " [FN157]

FN157. *Id.* (quoting *Lee,* 534 U.S. at 387, 122 S.Ct. 877).

"[I]n the habeas context," the doctrine of procedural default "is prudential rather than jurisdictional," [FN158] and that "procedural

default is normally a 'defense' that the state is 'obligated to raise' and 'preserve' if it is not to 'lose the right to assert that defense thereafter.' " [FN159] Therefore, in *Cotto,* the Second Circuit "assume [d] without deciding that the state bears the burden of proving the adequacy of the state procedural rule." [FN160]

FN158. *Id.* at 238. *Accord Spence v. Superintendent, Great Meadow Corr. Facility,* 219 F.3d 162, 170 (2d Cir.2000) ("The doctrine of procedural default is based on considerations of comity and finality, and not on a jurisdictional limitation on the power of a federal court under 28 U.S.C. § 2254 to look beyond a state procedural default and consider the merits of a defaulted claim that asserts a constitutional violation.").

FN159. *Cotto,* 331 F.3d at 238 n. 9 (quoting *Trest v. Cain,* 522 U.S. 87, 89, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997)).

FN160. *Id.* (citing *Bennett v. Mueller,* 296 F.3d 752, 761-63 (9th Cir.2002); *Hooks v. Ward,* 184 F.3d 1206, 1216-17 (10th Cir.1999)).

B. Motion to Amend a Pleading

Leave of court to amend a pleading "shall be freely given when justice so requires." [FN161] Whether to grant a motion to amend lies within the sound discretion of the trial court. [FN162] The Supreme Court has

"reject[ed] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept[ed] the principle that the purpose of the pleading is to facilitate a proper decision on the merits." [FN163] Like the other Federal Rules of Civil Procedure, Rule 15(a) should "be construed 'to secure the just, speedy, and inexpensive determination of every action.' " [FN164]

FN161. Fed.R.Civ.P. 15(a).

FN162. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *O'Hara v. Weeks Marine, Inc.,* 294 F.3d 55, 70 (2d Cir.2002).

FN163. *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *See also Foman,* 371 U.S. at 182, 83 S.Ct. 227.

FN164. *Foman,* 371 U.S. at 182, 83 S.Ct. 227 (quoting Fed.R.Civ.P. 1).

The Second Circuit has stated that " 'considerations of undue delay, bad faith, and prejudice to the opposing party [are] touchstones of a district court's discretionary authority to deny leave to amend.' " [FN165] A proposed amendment to the pleadings is especially prejudicial when discovery has already been completed and a summary judgment motion has been filed. [FN166]

FN165. *Krumme v. WestPoint Stevens Inc.,* 143 F.3d 71, 88 (2d Cir.1998) (quoting *Barrows v. Forest Labs.,* 742 F.2d 54, 58 (2d Cir.1984) (footnote omitted)).

FN166. *See id.* (citing *Ansam Assocs. v. Cola Petroleum, Ltd.,* 760 F.2d 442, 446 (2d Cir.1985)).

C. Doctrine of Laches

"An *equitable* action is barred by laches under New York law where the following exist: (1) proof of delay in asserting a claim despite the opportunity to do so; (2) lack of knowledge on the defendant's part that a claim would be asserted; and (3) prejudice to the defendant by the allowance of the claim." [FN167] "[I]t is well settled that the doctrine of laches ... has no application in actions at law." [FN168] Therefore, New York courts have held that laches does not apply to a motion to vacate a judgment in a criminal case. [FN169]

FN167. *Rapf v. Suffolk County of N.Y.,* 755 F.2d 282, 292 (2d Cir.1985) (*citing In re Diaz-Albertini's Estate,* 141 N.Y.S.2d 149, 154 (Sur.Ct.N.Y.Co.1955)) (emphasis added).

FN168. *Roth v. Black Star Publishing Co.,* 302 A.D.2d 442, 753 N.Y.S.2d 743, 744 (2d Dep't 2003) (quotation marks and citations omitted).

FN169. *See People v. Reed,* 273 A.D.2d 882, 709

N.Y.S.2d 764, 765 (4th Dep't 2000) (concluding that the lower court had "erred in denying defendant's motion on the ground that it was barred by the doctrine of laches" and vacating sentence of defendant, who was convicted in 1954); *People v. Kirkland,* 781 N.Y.S.2d 627 (Sup.Ct. Kings Co.2003) (conducting an in depth analysis and concluding that "[e]ven if this court is not bound by [the] *Reed* decision, the court would hold that as a matter of law, laches does not apply to motions to vacate a judgment"); *People v. Bell,* 179 Misc.2d 410, 686 N.Y.S.2d 259 (Sup.Ct.N.Y.Co.1998) (refusing to dismiss a section 440.10 motion on the basis of laches although convictions occurred over twenty-three years earlier).

D. Sixth Amendment Right to Counsel

The right to counsel is explicitly safeguarded by the Sixth Amendment, which states that "in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of counsel for his Defence." [FN170] A deprivation of the right to counsel constitutes a structural defect in the trial--it defies analysis by harmless error standards and requires automatic reversal of the conviction. [FN171]

FN170. U.S. Const. amend. VI; *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (holding that the right to counsel applies in all critical stages of state and federal criminal proceedings).

FN171. *See Brecht v. Abrahamson,* 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Accord United States v. Yakobowicz,* 427 F.3d 144, 153 (2d Cir.2005).

A criminal defendant also has a Sixth Amendment right to conduct his own defense, "provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by the rules of procedure and courtroom protocol." [FN172] When a defendant expresses the desire to proceed pro se, a trial court must engage in a "full and calm" discussion with him to ensure that he fully understands his decision. [FN173] However, the Second Circuit has declined to mandate any particular "talismanic" procedures to this end. [FN174]

FN172. *McKaskle,* 465 U.S. at 173, 104 S.Ct. 944.

FN173. *United States v. Hurtado,* 47 F.3d 577, 583 (2d Cir.1995).

FN174. *Id.*

In *Faretta v. California,* the leading case establishing the right of a defendant to conduct his own defense, the Supreme Court recognized that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with

relevant rules of procedural and substantive law." [FN175] Thus, a trial court must not permit pro se representation by defendants whose disruptive behaviors constitute an abuse of the rules or dignity of the courtroom. [FN176] This precept is set forth clearly in *McKaskle v. Wiggins,* where the Supreme Court held that a defendant must be "able *and willing* to abide by the rules of procedure and courtroom protocol" in order for pro se status to be properly granted. [FN177]

FN175. 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

FN176. *See, e.g., People v. Glover,* 90 A.D.2d 776, 455 N.Y.S.2d 285, 286 (2d Dep't 1982) (upholding refusal of the trial judge to permit pro se representation after "disruptive and baseless conduct" by the defendant); *Green v. State,* 277 Ark. 129, 639 S.W.2d 512, 513 (Ark.1982) (defendant's motion to proceed pro se was denied because of his declared refusal to comply with a court rule that briefs had to be printed or typewritten); *People v. Manson,* 71 Cal.App.3d 1, 139 Cal.Rptr. 275, 302-03 (Cal.App.2d Dep't 1977) (in light of defendant's ongoing "disruptive conduct" the trial court correctly denied his repeated requests to represent himself at trial).

FN177. *McKaskle,* 465 U.S. at 173, 104 S.Ct. 944 (emphasis added).

Courts have acknowledged the tension that may arise between a defendant's right to conduct his own defense and "trial judges' concern with ensuring that criminal defendants receive adequate legal representation." [FN178] To address this, a court may--"even over objection by the accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." [FN179] "A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard," [FN180] but it does not include an absolute bar on standby counsel's unsolicited participation in a hearing. [FN181]

FN178. *Johnstone v. Kelly,* 808 F.2d 214, 216 (2d Cir.1986).

FN179. *Faretta,* 422 U.S. at 834, 95 S.Ct. 2525 (citing *United States v. Dougherty,* 473 F.2d 1113, 1124-26 (D.C.Cir.1972)). *Accord Johnstone,* 808 F.2d at 216-17 ("Although the Constitution prohibits courts from requiring criminal defendants to be defended by counsel, it does not foreclose trial courts from using less overbearing means of ensuring that pro se defendants have adequate legal representation. In cases in which the trial judge fears that a pro se defendant lacks the ability to defend himself adequately, the judge can appoint counsel to assist the defendant in his pro se defense.")

(citations omitted).
Although appointment of standby counsel to assist a pro se criminal defendant is a common practice, the Supreme Court has held that defendants do not have a constitutionally protected right to such a "hybrid" defense. *See McKaskle,* 465 U.S. at 183, 104 S.Ct. 944.

FN180. *McKaskle,* 465 U.S. at 174, 104 S.Ct. 944 ("The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.").

FN181. *See id.* at 176, 104 S.Ct. 944.

Another common and permissible strategy is to grant pro se status at the outset of the trial and then terminate that status if defendant proves to be disruptive. [FN182] But upon termination of pro se status, the court must appoint counsel. [FN183] Similarly, if a defendant is absent from the courtroom due to an inability or unwillingness to abide by the rules of procedure and courtroom protocol, standby counsel must be appointed. [FN184] In one case in which a trial court did not appoint counsel in such a situation, the judgment of conviction was reversed and a new trial was ordered. [FN185] Although the defendant had insisted on his right to represent himself, the reviewing court found that "the [trial] court

should not have allowed the defendant to continue to proceed pro se once the defendant demonstrated by his conduct that his intent was not to pursue his self-representation in good faith, but was rather to disrupt the trial proceedings." [FN186] After the defendant was so unruly that he was removed from the courtroom, "[t]he trial proceeded to its conclusion without the presence of either the defendant or his standby counsel in the courtroom and without any defense being presented." [FN187] The appellate court held that "given the early warning signs of trouble, the [trial] court should not have dismissed the defendant's standby counsel, who could have taken over the defense once the defendant's conduct had forced the court's hand." [FN188]

FN182. *See Faretta,* 422 U.S. at 834, 95 S.Ct. 2525 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."). The *Dougherty* decision, favorably cited by the *Faretta* Court, noted that "the right to self-representation, though asserted before trial, can be lost by disruptive behavior during trial." 473 F.2d at 1124.

FN183. *See United States v. Brock,* 159 F.3d 1077, 1079 (7th Cir.1998) (court did not abuse its discretion by revoking defendant's pro se status because defendant's conduct made it "practically impossible" for the trial to proceed; "when a defendant's obstreperous behavior is so

disruptive that the trial cannot move forward, it is within the trial court's discretion to require the defendant to be represented by counsel"); *United States v. West,* 877 F.2d 281, 287 (4th Cir.1989) (court properly terminated pro se proceedings and appointed standby counsel because defendant flouted responsibility to act as officer of court by characterizing district court as "home team" on side of government); *United States v. Theriault,* 474 F.2d 359, 361 (5th Cir.1973) (standby counsel appointed and took over trial when defendant was excluded from courtroom); *People v. Gloster,* 175 A.D.2d 258, 572 N.Y.S.2d 370, 373 (2d Dep't 1991) (pro se defendant forfeited right of self-representation by actions in courtroom and standby counsel properly assumed responsibility).

FN184. *See People v. Anderson,* 133 A.D.2d 120, 518 N.Y.S.2d 658 (2d Dep't 1987).

FN185. *See id.* The *only other case* found by the parties or this Court in which a court did not appoint standby counsel although the defendant was absent from the courtroom for a significant portion of the trial is *People v. Howell,* 207 A.D.2d 412, 615 N.Y.S.2d 728 (2d Dep't 1994). In that case, defendant had rejected three appointed counsel and insisted on representing himself. When he later demanded a fourth lawyer, the court refused, and offered to recall the third lawyer, to which the defendant objected. The defendant refused to return to the

courtroom to participate in the case, and the case continued in his absence. The Second Department did not overturn the conviction, noting that the defendant's attempt to manipulate the process and his "continued explicit repudiation of such counsel" justified the trial court's action. *Id.* at 729.

FN186. *Anderson,* 518 N.Y.S.2d at 659.

FN187. *Id.*

FN188. *Id.*

Another way to express the same principle is to say a defendant cannot *irrevocably* waive the right to counsel at the outset of a criminal trial. [FN189] The Second Circuit has explained that "although a criminal defendant can waive her Sixth Amendment rights in some circumstances, that right to waiver is not absolute, since '[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.' " [FN190]

FN189. The *Faretta* Court, for example, explained that one reason to appoint standby counsel was "to be available to represent the accused in the event that *termination of the defendant's self-representation is necessary."* 422 U.S. at 834, 95 S.Ct. 2525 (emphasis

added). This language is not consistent with the idea of an irrevocable waiver. In another context, the Supreme Court has noted that certain procedures are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.' *See* 21 Wright & Graham § 5039, at 207-208; *see also Wheat v. United States,* 486 U.S. 153, 162, 108 S.Ct. 1692, 1698-1699, 100 L.Ed.2d 140 (1988) (court may decline a defendant's waiver of his right to conflict-free counsel).
Mezzanatto, 513 U.S. at 204, 115 S.Ct. 797. This opinion also favorably quotes the following reasoning from the Seventh Circuit: "No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *Josefik,* 753 F.2d at 588.

FN190. *United States v. Locascio,* 6 F.3d 924, 931 (2d Cir.1993) (quoting *Wheat,* 486 U.S. at 160, 108 S.Ct. 1692). *See also United States v. Jones,* 381 F.3d 114, 119 (2d Cir.2004) ("The disqualification issue ... implicates not only the accused's right to counsel, but also the interests of the judiciary in preserving the integrity of its processes, and the government's interest in a fair trial and a just verdict.").

IV. DISCUSSION

A. Statute of Limitations and Respondents' Motion to Amend the Answer

Clark was sentenced on October 6, 1983, and never filed a notice of appeal from the judgment of conviction. Thus, respondents could have raised the affirmative defense that the one-year grace period in which Clark was permitted to file her habeas corpus petition under the AEDPA expired on April 24, 1997. However, respondents' opposition papers, filed on May 11, 2005, never invoked the AEDPA statute of limitations. Clark's reply brief was then filed on July 14, 2005, making the petition fully submitted and ready to be decided on the merits.

[32] Respondents now rely on *Day v. McDonough* to argue that this Court should either (1) act in a sua sponte capacity to dismiss the petition as time-barred, or (2) allow respondents to amend their answer to raise the statute of limitations issue. In support of the former approach, respondents note that "while this Court is not required under *Day* to do so, sua sponte dismissal of Clark's petition is entirely appropriate, because her belated petition simply cannot overcome the threshold timeliness requirement." [FN191] In support of the second approach, respondents note that in *Day,* the Supreme Court mentioned that the district court could have "obviated th[e]

controversy" by "inform[ing] the State of its obvious computation error and entertain[ing] an amendment to the State's answer." [FN192]

FN191. Memorandum of Law in Further Support of Dismissal of the Petition Based Upon the United States Supreme Court Decision in *Day v. McDonough* at 2-3.

FN192. *Day,* 126 S.Ct. at 1683.

Yet respondents do not sufficiently address the Supreme Court's requirement that "the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." [FN193] I note that the second prong of this requirement incorporates a quotation from *Granberry v. Greer,* in which the Supreme Court addressed whether an appellate court could recognize a failure to exhaust defense sua sponte although respondent never raised it. The Court laid out the alternatives:

FN193. *Id.* at 1684 (quoting *Granberry,* 481 U.S. at 136, 107 S.Ct. 1671).

We might treat the State's silence on the matter as a procedural default precluding the State from raising the issue on appeal. At the other extreme, we might treat non-exhaustion as an

inflexible bar to consideration of the merits of the petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust. Or, third, we might adopt an intermediate approach and direct the courts of appeals to exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith. [FN194]

FN194. *Granberry,* 481 U.S. at 131, 107 S.Ct. 1671.

The Supreme Court adopted the middle course, as it did in *Day* within the context of the statute of limitations. In so doing, the *Granberry* Court indicated that the merits of the underlying claim were relevant when considering the interests of justice. [FN195]

FN195. *See, e.g., id.* at 136, 107 S.Ct. 1671 ("In this case the Court of Appeals simply held that the nonexhaustion defense could not be waived, and made no attempt to determine whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so."). *See also Krantz v. United States,* 224 F.3d 125, 126 (2d Cir.2000) ("[T]he interests of justice ordinarily require that [a defendant] not stand convicted without the resolution of the merits of an appeal.").

I recognize that if the statute of limitations had been properly raised in this case, this Court would be barred from considering the merits of Clark's claim. [FN196] But given respondents' default and the tardiness of the motion to amend, this Court is faced with the rare situation in which the Supreme Court has ruled that the court *must* " 'determine whether the interests of justice would be better served' by addressing the merits." [FN197] In considering a habeas petition in a similar posture, the Second Circuit reasoned that "[u]nlike in exhaustion cases, if we decline to reach the merits in a procedural default case, the defendant has no further recourse to either state or federal relief. Justice dictates that we act with greater leniency when determining whether to shut off a defendant's last avenue of hope." [FN198] In addition to constituting Clark's "last avenue of hope," her petition raises a troubling constitutional claim, which will be further explained below. [FN199] Given the unique facts of this case and the timing of the motion to amend, the interests of justice clearly favor considering the merits of the petition. Thus, respondents' motion to amend the answer is denied. I further decline to find, sua sponte, that the claim is time-barred.

FN196. Clark raises several arguments to support the idea that the merits of her petition should be reached even it the statute of limitations is applied, but she would be unlikely

to prevail on these arguments. For example, she argues that the statute should be equitably tolled due to her "mental incompetence" during the relevant period. Petitioner's Memorandum Concerning Equitable Tolling and Inapplicability of Habeas Corpus One-Year Statute of Limitations at 10. But respondents assert convincingly that petitioner's mental state cannot meet the exceptional circumstances standard for equitable tolling. They argue, for example, that "Clark's self-proclaimed 'mental disability' did not prevent her from acting as a plaintiff's representative in an unrelated federal class action lawsuit alleging unconstitutional conditions and practices at Bedford Correctional Facility." Memorandum of Law in Further Support of Dismissal of the Petition Under the AEDPA Statute of Limitations at 11.

FN197. *Day,* 126 S.Ct. at 1684 (quoting *Granberry,* 481 U.S. at 136, 107 S.Ct. 1671).

FN198. *Washington v. James,* 996 F.2d 1442, 1450 (2d Cir.1993).

FN199. *See infra* Part IV.E.

B. Doctrine of Laches

Although the state trial court found it unnecessary to reach respondents' argument that petitioner's claim should be barred by the doctrine of laches, the respondents renewed this argument in their submissions to this Court.

[FN200] Yet the weight of authority under New York law indicates that the doctrine is unavailable in motions to vacate a criminal judgment. In fact, respondents cite only two cases related to the doctrine of laches--one is a nuisance action [FN201] and the other holds that "[l]aches is an equitable remedy and generally does not bar an action at law." [FN202]

FN200. *See* Memorandum of Law in Support of Response Seeking Denial of Petition for a Writ of Habeas Corpus ("Resp.Mem.") at 31 n. 8; Memorandum of Law in Further Support of Dismissal of the Petition Under the AEDPA Statute of Limitations ("Resp. SOL Mem.") at 14-15.

FN201. *See* Resp. SOL Mem. at 14-15 (citing *Rapf,* 755 F.2d 282).

FN202. *Reed,* 709 N.Y.S.2d at 765. *See also* Resp. Mem. at 31 n. 8.

C. Procedural Bar

New York provides a mechanism for collaterally attacking a judgment that is in violation of a constitutional right--a "motion to vacate judgment" under section 440.10 of New York's Criminal Procedure Law. [FN203] Section 440.10(2)(c) mandates that a state court deny any motion to vacate judgment where the defendant *unjustifiably* failed to argue such

constitutional violation on direct appeal despite a sufficient record. [FN204]

FN203. *See* N.Y.Crim. Proc. Law § 440.10(1)(h) (McKinney 2005).

FN204. *See id.* § 440.10(2)(c) (emphasis added). The Criminal Procedure Law provides in pertinent part:
Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment [under § 440.10] when ... c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal. *Id.* A Bill introduced to the New York Assembly on May 19, 2005, contains a proposed amendment to this section, which would add the following words to the end of the language quoted above: "actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel." Assemb. B. 8632, 228th Leg. Sess. (N.Y.2005).

Here, the trial court found that petitioner's claim was defaulted under section 440.10(2)(c) of New York's Criminal Procedure

Law because it was based on the record and was not raised on appeal. [FN205] In reviewing such a decision, a federal court's "task is not to determine whether that ruling was correct, but to determine its adequacy to preclude federal habeas review." [FN206] While some Second Circuit decisions have found that the requirements of section 440.10(2)(c) barred federal habeas review of Sixth Amendment claims, [FN207] the most recent decision to address this issue held that courts must focus on "whether application of the procedural rule is 'firmly established and regularly followed' *in the specific circumstances presented in the case."* [FN208] The Second Circuit has not considered whether a defendant who was improperly granted pro se status and not provided with standby counsel had a "justifiable" reason for failing to raise her argument on direct appeal. In addition, the relevant Circuit cases preceded the Supreme Court's important guidance in *Lee v. Kemna.* Thus, I will analyze petitioner's claim that the state procedural default should not preclude federal review in the particular circumstances of this case by considering each of the three "guideposts" laid out in *Lee* and *Cotto.*

FN205. *See* 2003 Decision at 7.

FN206. *Cotto,* 331 F.3d at 247.

FN207. *See, e.g., Aparicio,* 269 F.3d at 93 ("[T]here can be no doubt that the state court's decision on Petitioner's trial counsel claim

rested on an adequate and independent state bar: Aparicio never raised ineffective assistance of trial counsel in his direct appeal. As we discussed above, New York law prohibits review of a claim on collateral review when the defendant *unjustifiably* fails to raise the claim on direct appeal.") (emphasis added) (citations omitted); *Reyes v. Keane,* 118 F.3d 136, 140 (2d Cir.1997) ("Reyes's 'unjustifiable failure' to raise the ineffective assistance of counsel claim on direct appeal ... leads us to conclude that the same claim is barred from habeas review because Reyes cannot show cause for his failure to raise the claim at the state level.").

FN208. *Cotto,* 331 F.3d at 240 (quoting *Lee,* 534 U.S. at 376, 122 S.Ct. 877) (emphasis added).

1. Whether the Procedural Violation Actually Affected the Trial Court Ruling

The first consideration is "whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision." [FN209] This case is similar to *Cotto,* because the state court clearly relied on the procedural default in making the challenged decision. [FN210] Yet because the dicta in the court's opinion indicates that the state court would have found that petitioner's motion lacked merit, it appears that perfect compliance with the state rule would not have changed the trial court's decision. In

Cotto, as in Clark's case, there were "indications from the trial court that it would have decided the same way even if it was unable to rely on the procedural ground." [FN211] Because "the likely impact of [compliance with the state procedural rule] involves a certain degree of speculation," the *Cotto* court held: "we do not think that this factor weighs as heavily in *Cotto's* favor as it did for the petitioner in *Lee.*" [FN212] Here, too, the first consideration weighs in Clark's favor, but not as heavily as if the court had not relied on the state procedural rule at all.

FN209. *Id.*

FN210. 2003 Decision at 7.

FN211. *Cotto,* 331 F.3d at 242. *Accord Lee,* 534 U.S. at 381, 122 S.Ct. 877. *See* 2003 Decision at 7 ("were the court to consider defendant's claim of a deprivation of her constitutional rights, it would find the claim completely meritless").

FN212. *Cotto,* 331 F.3d at 243.

2. New York Law

The second guidepost to consider is whether state law indicates "that compliance with the rule was demanded in the specific circumstances presented." [FN213] "In analyzing the adequacy of the claimed procedural bar, we look to the statute and case

law interpreting New York's statutory [procedural] rule." [FN214]

FN213. *Id.* at 240.

FN214. *Id.* at 243 (citing *Lee,* 534 U.S. at 382, 122 S.Ct. 877 ("[N]o published Missouri decision directs flawless compliance with [the state procedural rule] in the unique circumstances this case presents."). *Accord Arce v. Smith,* 889 F.2d 1271, 1273 (2d Cir.1989) (analyzing New York cases to determine whether the claim raised by the petitioner "is not regularly the subject of a procedural default in New York.").

In this case, a close reading of relevant New York law indicates that compliance with the procedural bar was not required in Clark's particular circumstances. The plain language of section 440.10(2)(c) of the New York CPL states that a motion to vacate must be denied when "sufficient facts appear on the record" to permit an appellate court to review the issues but "no such appellate review or determination occurred owing to defendant's *unjustifiable* failure to take or perfect an appeal during the prescribed period or to his *unjustifiable* failure to raise such ground or issue upon an appeal actually perfected by him." [FN215]

FN215. N.Y.Crim. Proc. Law § 440.10(2)(c) (emphasis added).

McKinney's Practice Commentaries, which

were used by the Second Circuit to interpret the CPL in *Cotto,* [FN216] explain this provision:

FN216. *See Cotto,* 331 F.3d at 245-46, 247 n. 16, n. 17.

In connection with Paragraph (c) of subdivision two, note the escape hatch regarding 'unjustifiable failure.' This implies that failure to perfect an appeal, or to have raised a point on appeal where the *nisi prius* record was sufficient could be excused, if it can be justified. Although the revisors did not supply any specific explanation of the purpose of this escape hatch, and there is no generally applicable appellate rubric construing it, consideration might be given to applying it in two situations. One would be where the ground was overlooked due to ineffective assistance of counsel. [FN217]

FN217. Peter Preiser, Practice Commentaries N.Y. § 440.10 at 426 (McKinney 2005).

Although Clark's case does not turn on the ineffective assistance of trial counsel, the same excuse exists where defendant had *no trial counsel at all* combined with an obvious unwillingness to represent herself in accordance with court rules and procedures. As the highest court in New York explained before the passage of the CPL, the rationale for not applying the procedural bar in a right to counsel case "is not hard to discern: the Petitioner's right to appeal

may be less than real if counsel is not at hand to advise him of that right or to take the necessary steps to perfect and prosecute that appeal." [FN218] This principle has direct relevance to Clark's situation-- although there were various lawyers and legal advisors in her vicinity, there was no person with an ethical duty to provide counsel to Clark, during or after her trial. Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might have been different. Because Clark's failure to appeal was "justifiable" given the rare circumstances of her case, application of the procedural bar in section 440.10(2)(c) was not demanded.

FN218. *People v. Howard,* 12 N.Y.2d 65, 67, 236 N.Y.S.2d 39, 187 N.E.2d 113 (1962). I also note that section 440 "codifie[d] the common-law writ of error coram nobis." *Harris,* 491 N.Y.S.2d at 682. This writ had been available to challenge violations of the right to counsel, even decades after a conviction, and even when the error appeared on the face of the record. *See People v. Silverman,* 3 N.Y.2d 200, 200-01, 165 N.Y.S.2d 11, 144 N.E.2d 10 (1957) (reversing trial court's refusal to hear petitioner's challenge to a 1934 judgment of conviction because "[j]udicial interference with the right to counsel guaranteed to defendant by law may warrant the extraordinary remedy of coram nobis, even though the error appears on the face

of the record"). The link between CPL section 440 and the writ of error coram nobis may explain why section 440's requirement that claims must be brought in accordance with the normal appeals schedule explicitly states: "This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial." N.Y.Crim. Proc. Law § 440.10(3)(a). The same link could also be relevant to the requirement under section 440.10(2)(c) that a procedural default must be "unjustifiable" in order to preclude review.

3. Substantial Compliance with the Rule and Legitimate Governmental Interest

The third *Cotto* "guidepost" directs courts to consider whether petitioner "has 'substantially complied' with the rule given 'the realities of trial,' and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest." [FN219] Petitioner does not claim that the section 440.10(2)(c) procedural bar is inadequate as a bar to federal habeas review in all circumstances or that the rule itself fails to protect a legitimate governmental interest. She does assert that she substantially complied with the rule given the particular circumstances of her case and that the rule's application to bar her claim was therefore both incorrect as a matter of state law and also inadequate to bar federal habeas review. [FN220] I agree, and note that the governmental interests at stake in

section 440.10 would not constitute legitimate interests in the particular circumstances of this case--where the procedural bar was automatically applied to prevent consideration of a section 440 motion even though petitioner's failure to appeal could be considered "justifiable" given the trial court's error in permitting her to proceed pro se when she was not "able and willing to abide by the rules of procedure and courtroom protocol." [FN221]

FN219. *Cotto,* 331 F.3d at 240 (quoting *Lee,* 534 U.S. at 382, 122 S.Ct. 877).

FN220. *Cf. Lee,* 534 U.S. at 382, 122 S.Ct. 877 (" '[A]lthough [the rules themselves] may not [have been] novel, ... [their] application to the facts here was.' ") (quoting *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 245, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) (Harlan, J., dissenting)).

FN221. *McKaskle,* 465 U.S. at 173, 104 S.Ct. 944.

4. Conclusion Regarding Procedural Bar

Given the lack of representation in the courtroom during critical portions of petitioner's criminal trial, I find that the application of section 440.10(2)(c) was not demanded in these particular circumstances and is not adequate to prevent federal habeas review. [FN222] "At a minimum, such a practice is not 'firmly

established and regularly followed' in the circumstances presented in this case." [FN223]

FN222. *Cf. Monroe,* 433 F.3d at 245 ("Despite the first and third *Cotto* factors going against Monroe, the fact that at the time of his trial the state was not usually requiring a contemporaneous objection--the second *Cotto* factor--predominates. Therefore, Monroe's failure to object contemporaneously is not an adequate and independent bar to our review.").

FN223. *Cotto,* 331 F.3d at 247.

D. Standard of Review

Because she filed her petition after 1996, Clark's case is governed by the federal habeas statute as amended by the AEDPA. [FN224] To determine whether the claim was "adjudicated on the merits," I must consider, inter alia, "whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits." [FN225] In this case the answer to that question is very clear. The court rejected petitioner's arguments about the procedural bar and the opinion concludes with the following paragraph: "The court finds that defendant's motion is procedurally barred, and it is therefore denied in its entirety. The court further finds it unnecessary to reach the People's argument that the motion is barred by the common law doctrine of laches." [FN226]

FN224. *See Williams,* 529 U.S. at 402, 120 S.Ct. 1495.

FN225. *Sellan,* 261 F.3d at 314 (quoting *Mercadel v. Cain,* 179 F.3d 271, 274 (5th Cir.1999)).

FN226. 2003 Decision at 7.

Respondents argue that the deferential standard of review should nevertheless be applied because the state trial court considered the merits of Clark's constitutional claim. However, the state trial court made it clear that this brief analysis was intended to be dicta, by concluding its summary and commentary with the words, *"were the court to consider* defendant's claim of a deprivation of her constitutional rights, *it would find* the claim completely meritless." [FN227] The state court's verb conjugation indicates that its decision was not intended to resolve the parties' claims on the merits, but instead on procedural grounds. Second Circuit courts have been instructed to use the plain meaning of "adjudicated on the merits," [FN228] and that which is clearly marked as dicta has not been adjudicated on the merits.

FN227. *Id.* (emphasis added).

FN228. *Sellan,* 261 F.3d at 312 ("In sum, the plain meaning of § 2254(d)(1) dictates our holding: For the purposes of AEDPA deference,

a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment.").

Nor did the Appellate Division adjudicate the claim on the merits. Its entire decision and order consists of two sentences. One summarizes the procedural posture of the case, and the other says, "Upon the papers filed in support of the application and the papers filed in opposition thereto, it is ordered that the application is denied." [FN229] Accordingly, I will apply a de novo standard of review to Clark's Sixth Amendment claim.

FN229. *The People v. Judith Clark,* Ind. No. 81-00285 (2d Dep't Jan. 20, 2004), App. A to Pet. Mem.

E. Sixth Amendment Right to Counsel

A review of the transcript demonstrates that Justice Ritter made many efforts to both preserve the rights of defendants and maintain the dignity of the courtroom under difficult circumstances. Yet there were two separate violations of the Sixth Amendment during Clark's trial: 1) the court should not have granted leave for Clark to represent herself; and 2) in any event, her pro se status should have been terminated when it became clear that no one would be in the courtroom to represent her interests during the presentation of the

prosecution's case. Both problems constitute structural defects in Clark's trial.

Clark was intelligent and experienced enough to be *able* to abide by the rules of procedure and courtroom protocol under *McKaskle,* but it was clear from the initial stages of the litigation that she was not *willing* to do so. On the day her application to proceed pro se was to be considered, Clark refused to be seated and then left the courtroom without permission, saying: "We will not proceed under these conditions ... This is a freedom fight. We are freedom fighters." [FN230] Justice Ritter himself described the defendants' behavior as a "refusal ... to conform to the most rudimentary rules of order." [FN231] When he attempted to address the problem by warning defendants, "[i]f you are to remain in this courtroom, you will do so only if you agree that you will conduct yourself in a nondisruptive fashion in conformity with basic rules of decorum that apply in this courtroom," Clark showed no remorse and indeed contested that she had been disruptive at all. [FN232] She stated that her "purpose to be here at all was to fight for my right to represent myself because I am a freedom fighter." [FN233] Finally, while Justice Ritter was questioning Clark concerning her request to represent herself, she stated that "this court system and the trappings of legality that it has created around the court system are a cover for being part of the maintenance of this system and being part of protecting property

and those who own and control that property." [FN234] Thus, Clark said she had come to believe "the only solution was revolution." [FN235]

FN230. 6/2/83 Tr. at 9.

FN231. *Id.*

FN232. *Id.* at 26.

FN233. *Id.*

FN234. *Id.* at 61. *See also id.* at 65 ("I wish to represent myself because as a freedom fighter I am the only one who can speak for myself and I can definitely not be represented by an officer of the court.").

FN235. *Id.* at 62.

In sum, Clark was forthright from the outset of the trial proceedings, stating that she did not recognize the authority of the court and refusing to abide by its rules. Justice Ritter apparently understood this refusal, as he raised the possibility that he might be "required ... by reason of [Clark's] conduct to remove [her] from the courtroom." [FN236] Given Clark's obvious unwillingness to abide by the rules of procedure and courtroom protocol, the Court erred in permitting her to proceed pro se.

FN236. *Id.* at 65-66 (emphasis added).

Even if the decision to allow Clark to represent herself was valid, an additional constitutional error occurred when Justice Ritter failed to terminate Clark's pro se status and appoint standby counsel after her refusal to abide by courtroom protocol became undeniable. Clark's interactions with Justice Ritter were dominated by interruptions, vocal pride about her status as a "freedom fighter," and demands concerning how and when the court should proceed. She and her co-defendants openly defied court rules and left the courtroom whenever they chose. Any confusion about defendants' willingness to abide by the rules of procedure should have dissipated quickly in light of their actions.

Respondents argue that none of this behavior warrants a termination of the right to conduct one's own defense. They note that some of the cases Clark cites involve more unruly behavior than she ever exhibited. [FN237] While it is true that the defendants' behavior in this case could have been more disruptive, this does not change the fact that pro se representation should only be allowed if a defendant "is able and willing to abide by the rules of procedure and courtroom protocol." [FN238] Respondents also cite cases for the proposition that "if a defendant deliberately leaves the courtroom after his trial has begun, he forfeits his right to be present at trial, regardless of whether he knows the trial will take place in his absence." [FN239] But these

cases are entirely distinct--there was a lawyer present to represent the defendant's interests in each of them. Here, Clark did not even have standby counsel.

FN237. *See* Memorandum of Law in Support of Response Seeking Denial of Petition for a Writ of Habeas Corpus ("Resp.Mem.") at 41-42.

FN238. *McKaskle,* 465 U.S. at 173, 104 S.Ct. 944.

FN239. Resp. Mem. at 42-43 (citing *Taylor v. United States,* 414 U.S. 17, 19-20, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973); *Clark v. Stinson,* 214 F.3d 315, 324-25 (2d Cir.2000); *People v. Sanchez,* 65 N.Y.2d 436, 443-44, 492 N.Y.S.2d 577, 482 N.E.2d 56 (1985)).

Respondents also dispute this finding, arguing that "Tipograph, and later Holmes, were available at trial for legal consultation" and "[i]ndeed, Holmes appeared at the trial when petitioner elected to be present." [FN240] But the "legal advisors" permitted by the court were not comparable to standby counsel, as respondents imply. When Holmes tried to advocate on defendants' behalf in their absence, Justice Ritter stopped her: "Miss Holmes, please listen to me ... You are not here as a spokesperson. Resume your seat." [FN241] Even if the trial had not continued when Tipograph was unavailable or when Holmes was absent, these two would not have been able to

fulfill the role of a lawyer or even the more limited role of standby counsel without the ability to speak in court.

FN240. *Id.* at 37.

FN241. 7/25/83 Tr. at 1018-19.

These arguments by respondents turn out to be peripheral, however, because the core of the constitutional defect is found in one snapshot from Clark's trial. During the prosecutor's opening statement and during the government's entire direct case against defendants, which spanned at least seven trial days, *no one* was present in the courtroom to represent Clark's interests. Clark was without assistance of counsel for her defense, in clear abrogation of her Sixth Amendment right to counsel. Indeed, these facts demonstrate the very reason that Clark's waiver of her right to counsel, even if sufficient *ab initio,* could not be irrevocable--the rationale lies in the judiciary's " 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.' " [FN242] The proceedings at issue, with no one sitting at the defense table during the prosecution's entire case, would have appeared unfair to many people with knowledge of the constitutional right to counsel or a respect for our adversarial system of justice.

FN242. *Locascio,* 6 F.3d at 931 (quoting *Wheat,* 486 U.S. at 160, 108 S.Ct. 1692).

The trial judge was obligated to procure standby counsel for Clark when her inability to proceed according to court rules and protocol led to the absence of any representation at all during vital portions of her trial. If a defendant who has been granted the right to represent herself subsequently refuses to abide by courtroom rules and protocol, her initial waiver of the right to counsel does not cure the unfairness of what developed in this case--defendant should not be left entirely without "the Assistance of counsel for h[er] Defence." [FN243]

FN243. U.S. Const. amend. VI.

V. CONCLUSION

For the reasons set forth above, Clark's petition is hereby granted and her conviction is reversed. The State must conduct a new trial within ninety days of this Order or release Clark from confinement. The Clerk of the Court is directed to close this case.

SO ORDERED:

Appendix C

District Court Decision on Stay

Clark v. Perez
S.D.N.Y.,2006.
United States District Court,S.D. New York.

Judith CLARK, Petitioner,
v.
Ada PEREZ, Superintendent Bedford Hills and Eliot Spitzer, Attorney General, State of New York, Respondents.
No. 05 Civ. 698(SAS).

Nov. 15, 2006.

Leon Friedman , Sharon Grobman, New York, New York, Lawrence Lederman, Michael L. Hirschfeld, Milbank, Tweed, Hadley & McCloy LLP, New York, New York, for Petitioner.

Eliot Spitzer, Attorney General for the State of New York, New York, New York, Michael E. Bongiorno, District Attorney of Rockland County, New City, New York, for Respondents.

OPINION AND ORDER

SCHEINDLIN, J.

I. INTRODUCTION

By a judgment entered September 22, 2006, this Court granted Judith Clark's petition for a writ of habeas corpus, thereby vacating her conviction pursuant to section 2254 of title 28 of the United States Code.[FN1]Ada Perez and Elliot Spitzer (hereinafter "the State") now move to stay enforcement of the writ pending the State's appeal. Alternately, the State moves to amend the provision of the judgment providing for Clark's conditional release from custody by striking language ordering the State to "conduct a new trial" within ninety days of the Opinion and Order, and substituting it with language ordering the State to "retry" Clark within ninety days of the Opinion and Order.[FN2]This seemingly minor alteration would allow the State to keep Clark imprisoned as long as her case remains on the trial calendar. For the reasons set forth below, the State's request for a stay is granted on the condition that all parties agree to an expedited appeal and the State's motion to amend the judgment is denied.

FN1. *Clark v. Perez,* No. 05 Civ. 698, 2006 WL 2708412 (S.D.N.Y. Sept. 21, 2006) (hereinafter "Opinion and Order").

FN2. Respondents' Memorandum of Law in Support of Motion to Stay the Judgment and Alternately to Amend the Judgment ("Resp.Mem.") at 13-14.

II. APPLICABLE LAW

Where a prisoner has successfully petitioned for a writ of habeas corpus and appellate review of her petition is pending, there is a strong presumption in favor of releasing her from confinement.[FN3]This presumption "may be overcome" if a request to stay the decision is made and " 'stay factors' tip the balance against it."[FN4]The Supreme Court laid out these factors in *Hilton v. Braunskill;* they include the "traditional" stay factors that apply to all civil cases, as well as factors that are unique to the habeas context.[FN5]

FN3.*See*Fed. R.App. P. 23(c) ("Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his own recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order."); *Hilton v. Braunskill,* 481 U.S. 770, 774 (1987) ("Rule 23(c) undoubtedly creates a presumption of release from custody in [habeas] cases.").

FN4.*Hilton,* 481 U.S. at 777.

FN5.*Id.* at 776-77.

The traditional criteria regulating whether a stay of a district court decision should be granted pending appeal are: (1) likelihood of appellant's success on the merits; (2) irreparable injury to the

party requesting a stay if one is not issued; (3) substantial injury to the party opposing the stay if one is issued; and (4) the public interests that may be affected.[FN6]

FN6. *See Mohammed v. Reno,* 309 F.3d 95, 100 (2d Cir.2002) (citing *Hilton,* 481 U.S. at 776).

The *Hilton* Court acknowledged the chameleon-like quality of these factors, noting that they will necessarily vary from case to case: "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a rigid set of rules."[FN7] For example, where a request is made to stay the granting of habeas relief, the following considerations should be taken into account:

FN7. 481 U.S. at 777.

the possibility of flight should be taken into consideration....[I]f the State establishes that there is a risk that the prisoner will pose a danger to the public if released, the court may [also] take that factor into consideration in determining whether or not to enlarge h[er]. The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.[FN8]

FN8. *Hilton,* 481 U.S. at 777.

Finally, the Second Circuit has endorsed a sliding scale approach to weighing the first traditional factor.[FN9] In considering whether a party requesting a stay is likely to succeed on the merits, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors."[FN10] In other words, if enough factors weigh in favor of a stay, one may be appropriate even where the party requesting it has failed to demonstrate a likelihood of success on the merits. "Simply stated, more of one excuses less of the other."[FN11]

FN9. *See Mohammed,* 309 F.3d at 101.

FN10. *Id.* (finding "considerable merit" in how this method has been used by the District of Columbia Circuit) (citation and quotation marks omitted). *Accord Washington Metro. Area Transit Comm'n v. Holiday Tours Inc.,* 559 F.2d 841, 843 (D.C.Cir.1977).

FN11. *Mohammed,* 309 F.3d at 101 (citation and quotation marks omitted).

III. DISCUSSION

A. Likelihood of Success on the Merits

The State's submissions present the same arguments on the merits that I rejected in my previous Opinion and Order.[FN12] They are no more convincing now than they were then. Notwithstanding the State's " 'less than a likelihood" ' of success on the merits, a stay is warranted here because other factors weigh so heavily in its favor.[FN13]

FN12. *See* Resp. Mem. at 3-6.

FN13. *Mohammed,* 309 F.3d at 101 (quoting *Dubose v. Pierce,* 761 F.2d 913, 920 (2d Cir.1985)). *See also id.* (noting that stays can issue "where the likelihood of success is not high but the balance of hardships favors the applicant," or where "[t]he probability of success is inversely proportional to the amount of irreparable injury plaintiff[ ] will suffer absent the stay") (citations omitted).

The peculiar circumstances of Clark's trial raise an important Sixth Amendment issue that goes to the merits of her habeas petition: whether a pro se defendant's right to counsel is violated where the defendant is not present at the proceedings, either by choice or at the court's direction based on her inappropriate conduct, and there is *no one* else present in the courtroom to represent her interests (*e.g.* standby counsel or court appointed counsel) throughout the prosecution's entire case. The gravity of this constitutional question, together with the fact that it has never been directly addressed by the

Second Circuit, tip the scales in favor of staying the judgment.[FN14]Justice Ruth Bader Ginsburg underscored the significance of these considerations in *Doe v. Gonzales,* where she declined to vacate a stay of a district court judgment that was pending review by the Second Circuit.[FN15] In *Doe,* the district court found a provision of the Patriot Act unconstitutional as applied to the facts of the case.[FN16]Under those circumstances, "the character of the constitutional issue presented and the expedited [appeals] schedule" favored keeping the stay in effect.[FN17]Moreover, a stay was appropriate because "[r]espect for the assessment of the Court of Appeals is especially warranted [where an appeal is] proceeding ... with due expedition."[FN18]Justice Ginsburg's analysis is certainly applicable here, in light of both the constitutional question Clark raises and the State's declared "inten[tion] to file [its] appeal as expeditiously as possible."[FN19]

FN14.*See, i.e., Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 111-12 (2d Cir.2002) (holding that certificates of appealability may issue in a habeas case where "the questions themselves are adequate to deserve encouragement to proceed further," even if a petitioner has not shown a likelihood of prevailing on the merits).

FN15.*See Doe v. Gonzales,* 126 S.Ct. 1, 4 (2005).

FN16.*See id.* at 1.

FN17.*Id.* Other factors tilting in favor of a stay in *Doe* included irreparable harm and injury to the public interest. *Id.* at 3.

FN18.*Id.* at 4. In *Doe,* the district court had "stayed its ruling [granting injunctive relief] to give the Government the opportunity to file an expedited appeal," which the Court of Appeals granted. *Id.* (citation omitted).

FN19. Respondents' Reply Memorandum of Law in Support of Motion for a Stay of Proceedings to Enforce the Judgment and, Alternately, to Amend the Judgment ("Resp. Reply Mem.") at 1.

B. Interest in Continued Custody

Another factor weighing in favor of a stay is the State's interest in Clark's continued confinement. The strength of this interest lies not in any danger of additional violence or likelihood of flight, but in the length of her remaining sentence.[FN20]Clark was sentenced to three consecutive indeterminate terms of twenty-five years to life. Assuming she serves the minimum, Clark still has fifty years left in custody. In itself, the sheer length of her remaining sentence militates against releasing her pending appeal. Nor is there any indication that granting a stay

will cause Clark substantial harm. She has already served twenty-five years in custody and has yet to request bail pending appeal. Clark maintains that she will only request bail "if there is an unnecessary delay in bringing her to trial in State court" and that her "chief interest is in expeditious consideration of the appeal" to ensure a prompt return of this matter to state court for retrial.[FN21]

FN20. The State asserts, without any apparent basis, that Clark's release could cause irreparable injury because she may still belong to "notoriously political" groups that advocate violence, such as the Black Liberation Army or the Weathermen. Resp. Mem. at 11-12. The only evidence in the record suggests the opposite. *See* Petitioner's Memorandum of Law in Opposition to Motion to Stay the Judgment and Alternatively to Amend the Judgment ("Pet.Mem.") at 12-15 (discussing in detail Clark's repudiation of violence and casting doubt on the present-day existence of these groups).

FN21. Pet. Mem. at 1-2.

IV. CONCLUSION

For the reasons set forth above, the State's motion to stay this Court's judgment is granted on the condition that the parties agree to an expedited appeal, and the State's motion to amend

the judgment is denied. The State must conduct a new trial within ninety days of the final judgment on Clark's petition or release her from confinement. The Clerk of the Court is directed to close this motion [Docket No. 17].

SO ORDERED:

Appendix D

Order Denying Rehearing en banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of March, two thousand and eight,

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Judith Clark

Petitioner-Appellee

v.

Ada Perez, Superintendent, Elior Spitzer, State of New York

Respondent-Appellants

ORDER

Judith Clark, having filed a petition for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc;

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk

By /s/ Frank Perez
Frank Perez, Deputy Clerk